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90-1324

No. .....

Supreme Court, U.S.
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IN THE .....

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEVADA,

Petitioner,

v.

CY JAMISON, Director of the Bureau of Land Management, Department of Interior; BILLY R. TEMPLETON, Nevada State Director, Bureau of Land Management, Department of Interior,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the State of Nevada have standing in the federal courts to challenge the approval by the Bureau of Land Management of a 51,632 acre right-of-way reservation of public lands allowing the Department of Energy to occupy the public lands for purposes of a program of site characterization of the Yucca Mountain site in southern Nevada for a high-level radioactive waste repository?

II. Did the Ninth Circuit Court of Appeals so far depart from the accepted and usual judicial constructs underlying Article III federal court jurisdiction by failing to observe the liberal notice pleading standards of the Federal Rules of Civil Procedure, by failing to recognize Nevada's material allegations of injury, by applying prudential limitations to Nevada's standing

inconsistent with federal law which has reduced the standing inquiry to the Article III minima, and by deciding the standing issue in a way that conflicts with applicable standing decisions of this Court as to call for an exercise of this Court's power of supervision?

PARTIES

The Petitioner before this Court is the State of Nevada. The Respondents are Cy Jamison, Director of the Bureau of Land Management, Department of the Interior, and Billy R. Templeton, Nevada State Director of the Bureau of Land Management.[1]

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[1]Pursuant to Fed R. App. P. 43(c)(1) and Rule 35.3 of this Court, the following substitutions are noted: Cy Jamison is substituted for Robert F. Burford, Director of the Bureau of Land Management, United States Department of Interior and Billy R. Templeton is substituted for Edward F. Spang, Nevada State Director, Bureau of Land Management.

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IN THE
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OCTOBER TERM, 1990

STATE OF NEVADA,
Petitioner,

v.

CY JAMISON, Director of the Bureau of Land Management, Department of Interior; et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, the State of Nevada, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on November 14, 1990.

OPINIONS BELOW

OPINIONS OF THE COURTS BELOW

The Opinion of the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed is reproduced at pp. 1 to 10 of the Appendix. It is officially

reported at 918 F.2d 854 (9th Cir. 1990). The Ninth Circuit Court of Appeals had jurisdiction of the matters in controversy pursuant to 42 U.S.C. § 1291.

The Bureau of Land Management issued an opinion on January 6, 1988, granting the Department of Energy an extensive right-of-way reservation and dismissed Nevada's objections in BLM document N-47748 reproduced in the Appendix at pp. 54 to 57. The United States District Court for the District of Nevada entered judgment and its Order Dismissing the State's Complaint on January 30, 1989. On March 9, 1989, the Court entered a Corrected Order which was reported at 708 F. Supp. 289 (D. Nev. 1989). The Court's Corrected Order is reproduced in the Appendix at pp. 11 to 54.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on November

14, 1990. There was no petition for rehearing.

This Court's jurisdiction to review the Ninth Circuit Court of Appeals judgment and opinion is conferred by Article III of the Constitution and 28 U.S.C. § 2106.

CONSTITUTIONAL PROVISIONS, APPLICABLE STATUTES AND REGULATIONS

The clauses and provisions of the Constitution are cited below and set forth verbatim at pp. 81 to 82 of the Appendix.

Federal Enclave Clause, Art. I, § 8, cl. 17; Property Clause, Art. IV, § 3, cl. 2.

The following provision of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, is involved in this petition:

Section 102(2)(C), 42 U.S.C. § 4332(2)(C). It is reproduced in the Appendix at pp. 82 to 85.

The provisions of the Nuclear Waste Policy Act, as Amended, 42 U.S.C. §§ 10101 *et seq.*, involved in this case are as follows:

Section 111, 42 U.S.C. § 10131

Section 113, 42 U.S.C. § 10133

Section 114, 42 U.S.C. § 10134

Section 115, 42 U.S.C. § 10135

Section 116, 42 U.S.C. § 10136

Section 119, 42 U.S.C. § 10139

Section 160, 42 U.S.C. § 10172

Section 407, 42 U.S.C. § 10247

They are reproduced in the Appendix, pp. 86 to 151.

The following provisions of the Federal Land Policy And Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*, are involved in this case.

Section 204, 43 U.S.C. § 1714

Section 507, 43 U.S.C. § 1767

They are reproduced in the Appendix at pp. 151 to 161.

The following federal regulations are involved in this case:

10 C.F.R. § 60.2

10 C.F.R. § 60.121

They are reproduced in the Appendix, pp. 161 to 163.

The following Nevada Statutes and Legislative resolutions are involved in this case:

NRS 328.065

NRS 328.500(2)

NRS 459.910

Assembly Joint Resolution 4 (1989)

Assembly Joint Resolution 6 (1989)

They are reproduced in the Appendix, pp. 163 to 172.

STATEMENT OF THE CASE

In 1982, the Congress enacted the Nuclear Waste Policy Act (NWPA), Pub. L. No. 97-425, 96 Stat. 2211 (1983) (now codified, as amended, at 42 U.S.C.

§§ 10101-10270) (1982 and Supp. V 1987)[2]. The NWPA, as originally enacted, provided a comprehensive legislative scheme for a national search for potentially acceptable repository sites (42 U.S.C. § 10136(a) (1982)) from which five would be nominated as suitable by the Secretary of Energy for site characterization to determine their suitability for geologic high-level radioactive waste repositories. 42 U.S.C. § 10132(b)(1)(A) (1982). From these five sites, the Secretary of Energy was to recommend three to the President for the actual process of characterization as candidate sites. 42 U.S.C. § 10132(b)(1)(B) (1982). After three sites had been found preliminarily suitable for a repository based upon site characterization results (42 U.S.C. § 10134(f) (1982), the Secretary was required to recommend one of them to the

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[2]Unless otherwise indicated, citation will be to Supp. V 1987.

President for development as a national high-level radioactive waste repository. 42 U.S.C. § 10134(a)(1) (1982). The President was then authorized to transmit a recommendation of the site to Congress if he considered the site qualified for an application for a construction authorization for a repository. 42 U.S.C. § 10134(a)(2)(A).

On May 27, 1986, the Secretary nominated five sites for characterization as candidate sites (51 Fed. Reg. 19733-84, June 2, 1986) and recommended three sites for site characterization, one each in Texas (Deaf Smith County), Washington (Hanford Reservation) and Nevada (Yucca Mountain). The President approved the Secretary's recommendation.

On December 22, 1987, the Congress amended the NWPA by bundling certain provisions entitled "Title V - Energy and Environment Programs, Subtitle A - Nuclear

Waste Amendments" Pub. L. No. 100-203, 101 Stat. 1330-227 (1987) (the 1987 NWPA amendments) with the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-202, 101 Stat. 1329 (1987) and Pub. L. No. 100-203, 101 Stat. 1330 (1987). The 1987 NWPA amendments designated Yucca Mountain as the sole site to be characterized for development as a repository site. 42 U.S.C. § 10172. Nevada's selection was made in the Conference Committee which considered the Senate version of the budget bill.

Nevada was also selected by the 1987 amendments as an alternate to a site which may be selected through a process of voluntary negotiation with a willing state or Indian tribe. 42 U.S.C. § 10247(c)(2)(B).

On November 24, 1987, the DOE filed an Application For Transportation And Utility Systems And Facilities On Federal

Lands, Standard Form 299, with the Bureau of Land Management. The State of Nevada, through the representation of its Attorney General, vigorously opposed the granting of a right-of-way on the grounds that a right-of-way was deficient in a variety of important respects as an instrument to authorize access for DOE's characterization of Yucca Mountain. The BLM officials were advised that the State had brought a judicial review action before the Ninth Circuit Court of Appeals (Case No. 86-7308) to compel the DOE to seek a congressional withdrawal and reservation of the site with a contemporaneous creation of a federal enclave by either a consent of the Nevada Legislature under Article I, Section 8, clause 17, or a suitable cession of jurisdiction before site characterization could proceed (decided as *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990)

cert. pending, Docket No. 90-992). The State renewed its enclave argument before the BLM, and raised statutory and regulatory compliance issues. On January 6, 1988, Respondent Spang granted the DOE's application and dismissed the State's objections. App. pp. 54 to 57. Respondent Spang's approval (contained in N-47748) purportedly created a reservation called a right-of-way reservation (ROWR) over approximately 51,632 acres of public lands.

On February 5, 1988, the State of Nevada and its Nuclear Waste Project Office, represented by the Nevada Attorney General, timely filed a Notice of Appeal of Defendant Spang's decision with Spang's office, thereby initiating an appeal before the Department of Interior Board of Land Appeals. On March 2, 1988, the Board extended the State's time to file a statement of reasons in support of the

appeal.

On March 25, 1988, the State commenced an action in the United States District Court for the District of Nevada to challenge the approval of the ROWR on a variety of statutory and constitutional grounds. On or about April 1, 1988, the State filed a motion with the Interior Board of Land Appeals to stay its proceedings pending the outcome in District Court. The State's motion was granted on August 2, 1988.

On January 30, 1989, the District Court entered an Order Dismissing the State's Complaint upon jurisdictional standing grounds. App. pp. 11 to 54. On March 9, 1989, the Court entered a Corrected Order which is reported at 708 F. Supp. 289 (D. Nev. 1989). The State appealed to the Ninth Circuit Court of Appeals on February 23, 1989. The case number on appeal was Case No. 89-15272.

On April 6, 1989, the Nevada Legislature enacted two resolutions, AJR 4 and AJR 6, which were approved by the Governor on April 17, 1989. App. pp. 167 to 172. Assembly Joint Resolution 4, expressed the Nevada Legislature's "adamant opposition to the placement of a high-level radioactive waste repository in the State of Nevada." Assembly Joint Resolution 6 prohibited the Federal Government from establishing a repository at Yucca Mountain, Nevada, without the prior consent of the Nevada Legislature or a cession of jurisdiction pursuant to Chapter 328 of the Nevada Revised Statutes, which consent and cession were refused. On April 19, 1989, both AJR 4 and AJR 6 were transmitted to the President, the United States Senate and the House of Representatives. Congress took no action in response to the transmittal.

On June 28, 1989, the Nevada Legislature enacted Assembly Bill 222 which was signed into law by the Governor of the State of Nevada on July 6, 1989. The law was codified in Nevada Revised Statutes (NRS) at Section 459.910. It states:

> 1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.
> 2. As used in this section, unless the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

App. p. 167.

On September 18, 1989, the Nevada Governor, Bob Miller, requested an opinion from the Nevada Attorney General concerning the status of the repository program and the implications for various environmental permit applications filed by the DOE based upon his belief and his intention that AJR 4 and AJR 6 constituted a valid and effective notice of disapproval pursuant to Section 116(b),

42 U.S.C. § 10136(b) of the NWPA. The Attorney General, in a letter opinion dated November 1, 1989, agreed that the Governor correctly characterized AJR 4 and AJR 6 as a notice of disapproval authorized by Section 116(b) of the NWPA, 42 U.S.C. § 10136(b). He further stated his opinion that the Yucca Mountain site had been disapproved by inaction from Congress.

On January 5, 1990, Nevada filed Case No. 90-70004 in the Ninth Circuit Court of Appeals, a petition for review of the Secretary of Energy's refusal to recognize Nevada's notice of disapproval as a veto of the site or as a disqualifying condition and his failure to terminate site characterization activities.

On February 2, 1990, a motion's panel of the Ninth Circuit Court of Appeals ordered Case No. 90-70004 consolidated with Case No. 86-7308. *See* discussion at

p. 9-10, *supra*. The panel also ordered, on April 9, 1990, that Case No. 89-15272 and the consolidated cases would be heard and decided by the same panel of Ninth Circuit Court of Appeals justices.

On September 19, 1990, the Ninth Circuit Court of Appeals panel decided the two consolidated cases in *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990). In *Nevada v. Watkins*, the State challenged, *inter alia*, the presence of a textual basis in the Constitution which would permit the Department of Energy to develop a high-level radioactive waste repository in an unconsenting state such as Nevada where Nevada law prohibits the storage of high-level radioactive waste in the State. The panel identified the Property Clause as the textual basis for the DOE's program. On December 18, 1990, the State of Nevada and individual petitioners filed a petition for a writ of

certiorari in this Court. The case was docketed as Case No. 90-992. The petition has been calendared for the Court's action on the petition on February 15, 1991.

On November 14, 1990, the same panel of the Ninth Circuit Court of Appeals decided Case No. 89-15272. The panel of the Ninth Circuit Court of Appeals decided that Nevada had not established standing to object to the approval by the Bureau of Land Management (BLM) of the 51,632 acre right-of-way reservation allowing the Department of Energy to occupy Yucca Mountain for purposes of excavating, boring and otherwise disrupting the surface and subsurface of the mountain in the process of studying the mountain for its suitability as a high-level radioactive waste repository. The State of Nevada now seeks review by this Court through its petition for a writ of certiorari. The petition for a writ of

certiorari in this case and the petition in Docket No. 90-992 should be considered together as companion cases. The Petitioners in Docket No. 90-992 have filed a motion to defer consideration in that case so that the two cases may be considered together.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeal's panel made two startling decisions in *Nevada v. Watkins, supra*, and this case. In *Nevada v. Watkins*, the Court held that the Property Clause, in and of itself, may serve as the textual basis for the exercise of power by Congress to take title to privately produced, dangerous substances and to dispose of them in a federal facility on the public lands in an unconsenting state whose laws forbid the disposal of such substances within its borders. In this case, the panel held that the state which is targeted for the

waste disposal facility has no standing to complain of the alleged unlawful agency action which authorized the access and occupancy of public lands identified for the development of the facility. These cases, when taken together, portend ominous and potentially devastating consequences for the public land states. This is especially so when it is considered that the Ninth Circuit Court of Appeals exercises jurisdiction over the greatest proportion of the public lands. This Court should grant review of the issues of these cases now. The important issues raised by these cases are unencumbered by complex factual considerations and their resolution will not benefit from further "percolation" in the lower federal courts.

A. This Court's Power Of Supervision Is Called For To Correct The Ninth Circuit Court Of Appeals Abdication Of Its Duty To Exercise Its Jurisdiction

The Ninth Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings by its affirmance of the decision of the United States District Court for the District of Nevada, as to call for an exercise of this Court's power of supervision.

In numerous decisions of this Court, the rule that a federal court must take and exercise the jurisdiction it has is well established. This Court stated in the case of *Wilcox v. Consolidated Coal Co.*, 212 U.S. 19, 40 (1909) that "[w]hen a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens v. Virginia*, 6 Wheat 264, 404) and in taking that jurisdiction the Court cannot be truthfully spoken of as precipitate in its conduct." In the passage from *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821) this Court

stated that the federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), this Court observed that there is a "virtually unflagging obligation of the federal courts to exercise jurisdiction given them." *See also New Orleans Public Service, Inc. v. Council of New Orleans*, ____ U.S. ____, 109 S.Ct. 2506, 2513 (1989) (quoting *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893)); *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988).

The Ninth Circuit Court of Appeals abdicated its duty to accept jurisdiction in at least four ways: First, the Court deviated from the notice pleading standards of the Federal Rules of Civil

Procedure and imposed a rigid fact pleading requirement. Second, it failed to recognize certain of Nevada's well plead material allegations which established actual and threatened injury or mischaracterized others as "mere speculation", (App. p. 8). Third, it applied prudential limitations to the question of Nevada's standing in the face of Congress' policy in the NWPA and the Administrative Procedures Act, 5 U.S.C. § 702, which reduces the standing requirements relative to Nevada's challenges to federal agency action in connection with the federal program to site a high-level radioactive waste repository to the Article III minima. Fourth, the Court decided the standing issue in a way that conflicts with applicable standing decisions of this Court.

1. Nevada Provided A Short And Plain Statement Alleging Injury

At oral argument, Justice Wallace, who authored the Ninth Circuit Court's opinion, asked the crucial question to Nevada's counsel: What is the injury? Nevada's counsel answered by citing to Paragraph 3.2 of Nevada's Complaint which states:

> The Defendants have conspired with the Department of Energy Officials to create a fait accompli in which the State of Nevada's political right to object to its selection as the host for a repository for the nation's spent nuclear fuel rods is rendered meaningless. The object of their conspiracy is to render Nevada, a politically weak State, defenseless to the interests of the other 49 states in solving a purely commercial problem at the expense of Nevada which has played no part in creating the problem.

The response satisfied two requirements for standing: One, under the rules of notice pleading Nevada alleged an actual injury fairly traceable to the challenged conduct and, two, the allegation was

contained in the Complaint.[3] Nevada's oral argument and briefs before the Ninth Circuit Court stressed the implications of Paragraph 3.2.

Nevada contended that the infringement of its "political right to object" in Paragraph 3.2 of its Complaint, was referable, in part, to the circumvention of the substantive and procedural provisions of FLPMA and NEPA which give Nevada rights of participation in an important public land decision which provides DOE with access to Yucca Mountain for development of a repository. Nevada also contended that the injury to its political right to object was referable to the right of Nevada to submit a notice of disapproval under Section 116(b) of the

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[3]The State's counsel pointed out that in the lengthy District Court opinion no mention was made of Paragraph 3.2 of the Complaint. The District Court accepted the BLM's assertions, in toto, as to Nevada's standing (708 F. Supp. at 292, App. p. 15) but, as Nevada's counsel pointed out, no mention was made in BLM's extensive briefs (112 pages) of Paragraph 3.2.

NWPA.

Nevada asserted direct economic injury in relation to the "at the expense of" language of Paragraph 3.2 by pointing out that the negative imagery and perceptions of risk as amplified by the media, tends to dissuade tourists and the recreating public from visiting an area that is identified with the storage of highly radioactive and dangerous waste byproducts. Nevada further asserted that the recreating public does not make its decisions and choices based on the fine distinctions associated with a label such as site characterization.

Nevada presented credible documentary evidence to the Court in an Appendix to its briefs in support of its economic and environmental endangerment assertions. The State also provided such evidence upon which a reasonable trier of fact could conclude that the BLM officials had

conspired with the DOE.

The harm which Nevada asserted did not go without notice in either of the lower Courts. The District Court noted at 708 F. Supp. 296, n.8 (App. p. 32):

> Cited as 'specific examples of direct injury to Nevada's sovereign and quasi-sovereign interests', Nevada discusses the polarization of the population and infrastructure, and the potentially negative influence a repository would have on the state's image as a tourist destination (#19 at 26-27).

The Ninth Circuit Court of Appeals, in similar recognition, correctly observed that:

> In this case, Nevada alleges that the selection of Yucca Mountain as the site for a national repository will have a devastating effect on the state's vital tourist industry.

App. p. 9.

Nevada did not limit its allegation of harm to a time when the repository is formally selected. As evidence of continuing injury, the State cited a report of nationally known experts which

had peer-reviewed Nevada's socioeconomic impact studies. The Technical Review Committee concluded:

> From the evidence now available, it appears that the designation of Yucca Mountain as the site for a repository has already had significant socioeconomic impacts on Nevada, and that, depending upon numerous decisions not yet made by federal, state, and local agencies as well as public reactions to future events, the development of the repository could have a profound effect upon the economy and quality of life of people of the region. This conclusion arises in part from observation of the effects on the political and social fabric of Nevada over the fourteen years since investigations commenced at Yucca Mountain, and in part from emerging findings related to public perceptions of the risks of waste transportation, storage, and disposal.

Nevada also contended that the stigma associated with the development of what has been commonly characterized by the media as a "nuclear dump" is, itself, an injury which satisfies standing.

Nevada traced the alleged injuries to the putative illegal conduct of the

Respondents. Without access authorization to Yucca Mountain, the DOE would be unable to conduct site characterization. Without site characterization, the selection of Yucca Mountain as the federal high-level radioactive waste repository cannot be realized. The actual and threatened injury, therefore, is directly linked to BLM's decision to approve DOE's access through the ROWR for site characterization.

While Nevada may not frustrate lawful federal agency decisions, it has a judicially cognizable standing to prevent unlawful decisions that result in injury to its legitimate interests. *See* Complaint, Paragraph 1.12, App. pp. 67 to 69. The BLM officials authorized access for site characterization through what Nevada contends is an unlawful instrument identified by BLM as a right-of-way reservation.

Nevada sought declaratory relief and a court order setting aside the ROWR and injunctive relief requiring the BLM to comply with applicable law. The relief requested was within the power of the Court and capable of being fashioned in an appropriate order.

2. The Lower Court Mischaracterized And Failed To Recognize Nevada's Material Allegation Of Injury

As indicated by the foregoing section, Nevada supplied in its Complaint, "a short and plain statement of the claim" under Rule 8(a) of the Federal Rules of Civil Procedure which satisfied the liberal notice pleading concepts announced by this Court fifteen years after Rule 8(a) had abolished fact pleading. In *Conley v. Gibson*, 355 U.S. 41, 47 (1957) this Court stated:

> [T]hat the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain

> statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

See also United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-89 (1973); *compare Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-78 (1982).

The Ninth Circuit Court, although having recognized Nevada's allegation of economic injury associated with site characterization, refused to accept such allegations as satisfying the Article III standing requirement. The Ninth Circuit Court of Appeals mischaracterized the gravamen of Nevada's well plead short and plain statement of its claim that "its political right to object to its selection as the host for a nuclear waste repository has been rendered meaningless by the Bureau's action" by suggesting that "the decision of whether to construct the repository at Yucca Mountain is many years

and numerous procedural hurdles away." App. p. 8. The Court further stated that "Any claim by Nevada that site characterization will inevitably lead to the designation of Yucca Mountain as a repository is mere speculation . . . ." App. p. 8.

In the recent case of *Lujan v. National Wildlife Federation*, ____ U.S. ____, 110 S.Ct. 3177, 3189 (1990) this Court stated the rule that a Rule 12(b) motion "presumes that general allegations embrace those specific facts that are necessary to support the claim." The Ninth Circuit Court, while giving lip service to the rule when it stated: "we must construe the complaint in favor of Nevada, and accept as true all of Nevada's material allegations," (App. p. 6), nevertheless inappropriately ignored or dismissed those allegations as "mere speculation." The Ninth Circuit Court

deviated from this Court's construction in *Lujan* of the well-established rule.

In support of its general allegation, Nevada had argued in its reply briefs in both of the companion cases that the process of site characterization would subject Nevada's Yucca Mountain site to consideration as an alternate site in an Environmental Impact Statement (EIS) prepared by the Nuclear Regulatory Commission for a site within a state which has negotiated to volunteer such site for a repository. *See* 42 U.S.C. 10247(c)(2)(B).[4] Nevada argued that if

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[4]In *Nevada v. Watkins, supra,* 914 F.2d at 1559-60, the Ninth Circuit Court refused to address this argument. In support of that refusal the Court stated:

> In its reply brief, Nevada raises for the first time the argument that 42 U.S.C. § 10247(c)(2)(B) constitutes a selection of Yucca Mountain as the repository site. Petitioners' Reply Brief at 2, 33. Section 10247(c)(2)(B) was enacted by Congress as part of the Omnibus Budget Reconciliation Act of 1987. As a result, Nevada had the opportunity to raise this issue in its opening brief. Consideration of this argument would be unfair to the Secretary, who has not had the advantage of briefing the issue. In declining to consider this argument, we follow "'[t]he general rule . . . that appellants cannot raise a new

site characterization goes forward, Nevada will have been selected for discriminatory treatment in relation to the negotiated site. This is not "mere speculation" as the lower court characterized it, but rather, the clear effect of federal law.

Injury to Nevada's political right to issue a notice of disapproval under Section 116(b), 42 U.S.C. 10136(b), should site characterization go forward, is established, as indicated, by the Yucca Mountain site's identification as the

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issue for the first time in their reply briefs.'" *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986) (quoting *Thompson v. Commissioner*, 631 F.2d 642, 649 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981)).

The State advanced the same argument in the reply brief in this case. The BLM's counsel responded to it at oral argument. The Court ignored it. It should be noted that if the State had advanced the argument in its opening briefs it would have been criticized on ripeness grounds or as speculation because a Nuclear Waste Negotiator, who is charged with the responsibility to find a volunteer site, had not been nominated at that time. The State pointed out in its reply brief that "On June 4, 1990, the President nominated David H. Leroy, a former Lieutenant Governor of Idaho, to be the HLW Negotiator." He was subsequently confirmed by the Senate. Nevada filed its opening brief on May 16, 1990.

alternate in the NRC's EIS. The Secretary of Energy is required to prepare an Environmental Impact Statement for the "negotiated site" to accompany the application to the NRC for a repository construction authorization. Section 407(b), 42 U.S.C. 10247(b). The NRC "*shall consider the Yucca Mountain site as an alternate to such site*" in the EIS it must prepare to accompany the grant of a repository construction authorization for a negotiated site. (Emphasis added). Section 407(c)(2)(B), 42 U.S.C. 10247(c)(2)(B). The characterization of the Yucca Mountain site shall be compared with the characterization of the "negotiated site" in the NRC's EIS. Thus, a site from a volunteer State will be compared to a site from a conscripted State, Nevada, and Nevada's site may emerge as the preferred alternative. Nevada, therefore, will be injured by

discriminatory treatment in being deprived of the opportunity to issue a notice of disapproval which the volunteer State has voluntarily waived.

Even if a negotiated site does not materialize, if Yucca Mountain is characterized and found suitable, a high degree of jeopardy attaches to Nevada's final selection as a repository. There is no way of determining whether the Yucca Mountain site could satisfy the NRC's licensing requirements in 10 C.F.R. Part 60 without site characterization. Site characterization is the process, once it is completed, by which the Secretary of Energy can represent that a site is suitable for development as a repository. Based upon the process by which Nevada was selected for characterization by the Congress, once site characterization has been completed, the selection of the Yucca Mountain site by the President and

Congress is a highly probable conclusion.[5] In fact, Nevada contends that there has been a *de facto* selection already.

The fate of the Yucca Mountain site, if site characterization goes forward, will depend on decisions which are completely out of the State's control.

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[5]If the Congress is willing to mistreat Nevada at the beginning of the repository siting process, there is no reason to believe that it will refrain from doing so at the end of the process. The Ninth Circuit Court dismissed Nevada's complaint of discriminatory treatment by Congress in *Nevada v. Watkins*, 914 F.2d at 1556:

> Nevada cannot point to any defect in the political process that led to the enactment of the 1987 NWPA amendments. As the Secretary points out, the Tenth Amendment does not protect a State from being out-voted in Congress. Nevada's relative lack of political strength is a result of the "Great Compromise" of the 1787 Constitutional Convention, in which each State was guaranteed equal representation in the Senate and proportionate representation in the House of Representatives.

The threatened and predictable action of Congress, for which Nevada has no remedy, at least according to the Ninth Circuit Court, raises Nevada's allegation above the level of "mere speculation." The expenditure of billions of dollars to accomplish site characterization was alleged by Nevada in Paragraph 1.14 and 1.17 of its Complaint (App. pp. 70 to 71 and 73-74) as a factual averment to support the State's allegation of a "fait accompli." The Ninth Circuit Court ignored the averment.

The threatened loss of its statutory notice of disapproval rights is a "distinct and palpable injury" which confers standing. The Ninth Circuit Court of Appeals refused to recognize it as such.

B. The Ninth Circuit Court Of Appeals Erred By Applying Prudential Limitations To The Question Of Nevada's Standing

1. The Lower Court Failed To Recognize That Nevada's Oversight And Monitoring Role Under The NWPA Reduced Its Proof Of Standing To The Article III Minima

The Ninth Circuit Court of Appeals stated that "Clearly the right-of-way decision has not stripped Nevada of its right to participate in the site characterization process . . . ." App. p. 8. On the other hand, the Court candidly recognized that "Nevada contends that the Bureau violated requirements of the Land Act [FLPMA] by issuing the right of way . . . " (App. p. 6) and "Nevada

further argues that the environmental assessment accepted by the Bureau in connection with the right-of-way grant is insufficient to satisfy the requirements imposed by the Environmental Act." App. p. 7. It is difficult to perceive how Nevada can participate in the site characterization program if Nevada is denied standing to require the BLM, when acting in concert with its sister agency, the DOE, to follow the law in making decisions which concern site characterization. Nevertheless, standing was denied by the Court despite Nevada's allegation in Paragraph 1.5 of its Complaint that Nevada has oversight and monitoring responsibility under the NWPA which extends to agency action by the BLM insofar as it affects site characterization.[6] The Ninth Circuit

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[6]The complete allegation in Paragraph 1.5 of the Complaint is:

1.5 The Plaintiff State of Nevada, has oversight and monitoring responsibility

misapplied this Court's statement from *Allen v. Wright*, 468 U.S. 737 (1984) in relation to Nevada's role under the NWPA:

> [A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. *Allen*, 468 U.S. at 754; . . .

The Ninth Circuit Court's failure to question Nevada's standing in the companion case, *Nevada v. Watkins*, 914 F.2d 1545 (1990), which involved Nevada's challenge to DOE's failure to follow the law, belied its reliance on the statement in *Allen*. A number of issues in *Watkins* were identical to those raised in this case. For instance, in Case No. 86-7308 (one of the consolidated cases in *Nevada v. Watkins, see discussion, supra,* at pp. 9-10), Nevada sued the Secretary of Energy

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> for the Department of Energy's program to characterize the site and, if subsequently selected, for the construction of a high-level nuclear waste repository at Yucca Mountain, Nevada. The State's oversight role extends to agency action by the BLM insofar as it affects site characterization.

App. p. 63.

for his failure to acquire a congressional withdrawal and reservation of land on and around Yucca Mountain with a contemporaneous cession of jurisdiction from the Nevada Legislature before commencing site characterization in the absence of some determination by the Nuclear Regulatory Commission that a lesser jurisdiction and control was permissible under its regulation in 10 C.F.R. 60.121. The same issue was raised in this case against Robert F. Burford as Director of the BLM. *See* Complaint, Paragraphs 1.8 and 1.11, App. pp. 64 to 67.

The Ninth Circuit Court failed to address Nevada's arguments regarding the implications of Congress' policy recognizing Nevada's oversight role under the NWPA. Had it done so it would have recognized that Nevada has standing not only to challenge actions of the DOE but

also those of the BLM when decisions are made which affect the repository siting program. The Ninth Circuit Court inferentially recognized the inconsistency of its decision regarding Nevada's standing to challenge DOE but not the BLM when it recognized, with respect to the NWPA, that:

> In order to aid the Department in its site characterization activities, the Waste Act provides,
>
> > [t]o the extent that the taking of any action related to the site characterization of a site . . . requires a certificate, *right-of-way*, permit, lease, or other authorization from a Federal agency or officer, such agency or officer shall issue or grant any such authorization at the earliest practicable date, to the extent permitted by the applicable provisions of law administered by such agency or officer.
>
> 42 U.S.C. § 10140(a)(1) (emphasis added). Pursuant to this section, the Department applied to the Bureau in November 1987 for a right-of-way over public land near Yucca Mountain.

App. p. 2. Section 119(a)(1)(C) of the

NWPA, 42 U.S.C. 10139(a)(1)(C), provides that the Ninth Circuit Court of Appeals has "jurisdiction over any civil action . . . challenging the constitutionality of any decision made, or action taken, under any provision of this subtitle." The provision cited by the Ninth Circuit Court, Section 120(a)(1), 42 U.S.C. § 10140(a)(1), and the section which it follows, Section 119, are both parts of Subtitle A of the NWPA. As Nevada's Complaint challenged the constitutionality of the BLM's decision to approve the right-of-way, it was within Section 120(a)(1) and subject to the Ninth Circuit Court's jurisdiction.[7] *See, e.g., General*

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[7]The District Court recognized the Ninth Circuit's jurisdiction in *Nevada v. Burford* at 708 F. Supp. at 301, n.14, App. p. 53:

> Moreover, Nevada's challenge under the Tenth Amendment is directed solely at the NWPA Amendments of 1987, which designate Yucca Mountain as the sole study site. Consequently, this Court is without jurisdiction since Congress vested original and exclusive jurisdiction over such matters arising under the NWPA with the courts of appeal. 42 U.S.C. § 10139(a)(1)(C) (1982).

Electric Uranium v. U.S. Department of Energy, 764 F.2d 896, 901-02 (D.C. Cir. 1985); *State of Tenn. v. Herrington*, 806 F.2d 642, 650 (6th Cir. 1986).

Congress, therefore, had reduced the standing requirement as to a judicial review action challenging the decisions of the BLM, when made under Section 120(a) of Subtitle A of NWPA, to its Article III minima by the enactment of Section 119 just as with judicial review actions against the DOE. The Ninth Circuit Court failed to address Nevada's arguments on this point.

This Court has recognized that "[t]he actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975). *See also, Havens Realty Corp. v. Coleman*, *supra*, at 373. In *Warth v. Seldin*, at 500

this Court stated that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Nevada, by its direct selection in the 1987 Amendments to the NWPA, was given a private cause of action to challenge the unlawfulness of federal agency action. In order to establish public confidence that the repository program was being conducted in a manner that would protect the public and the environment, this was a concession that Congress found necessary. *See* Section 111(a)(6), 42 U.S.C. § 10131(a)(6).

In *Nevada v. Herrington*, 827 F.2d 1394, 1400 (9th Cir. 1987), the Ninth Circuit Court of Appeals recognized that:

> Congress provided for judicial review in section 10139 of the Act [NWPA] and the states are free to challenge DOE's action pursuant to

this provision.

If, as the Ninth Circuit Court held, Nevada is free to challenge DOE's actions, the State should have standing to challenge the BLM's actions when it is acting in concert with the DOE.

At least some of the errors of the Ninth Circuit Court of Appeals may be traced to its failure to appreciate the fact that because Congress did in fact reduce Nevada's proof of standing to the Article III minima, the prudential limitations applied by the Court were applied in error. Nevada argued in its briefs and at oral argument that it was error for the District Court to utilize prudential limitations to reject Nevada's standing; the Ninth Circuit Court has rejected Nevada's arguments and endorsed the errors of the District Court.

2. The Lower Court Failed To Recognize That Nevada's Proof Of Standing Is Reduced To The Article III Minima By The APA And That Nevada Is In The Zone Of Interest Of The Relevant Statutes

The precedents of this Court recognize that where, as here, a state sues under the Administrative Procedures Act, 5 U.S.C. § 702 et seq., the Congress has enlarged standing to the full extent of the Article III minima, and prudential limitations are not applicable. *See, e.g., Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Both of the lower Courts erred by imposing prudential limitations on the State's standing.

This Court has developed a "zone of interests" test to aid in standing determinations involving the Administrative Procedures Act grant of standing "to a person 'aggrieved by agency action within the meaning of a relevant

statute.' 5 U.S.C. § 702" *See, e.g., Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970).

In this Court's recent case of *Lujan v. National Wildlife Federation, supra*, the "zone of interests test" was discussed in the same context as that complained of in this case. Nevada, like the NWF complained of illegal alterations of land use classifications without compliance with the procedural and substantive requirements of the FLPMA. *See* Paragraph 1.12 of Nevada's Complaint, App. pp. 67 to 69. The similarity of the issues prompted the State to cite the preliminary injunction which enjoined the Director of the BLM from altering land use classifications existing on January 1, 1981 which had been issued by the District Court in *National Wildlife Federation v. Burford* (referred to by this Court, 110 S.Ct. at 3184). *Id.*

This Court stated in *Lujan* that:

> [W]e have said that to be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Consistent with this Court's construction of § 10(a) of the APA, 5 U.S.C. § 702, Nevada alleged in its Complaint and has shown that it suffered "legal wrong because of the challenged agency action" and is "'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'" *Lujan*, 110 S.Ct. at 3186.

It is enough that the plaintiff be "arguably in the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *See, e.g., Data Processing Service Organizations v. Camp, supra,* at 153.

Congress legislated that Nevada is in the "zone of interests" with respect to the NWPA by establishing Nevada's rights of participation. *See, e.g., Nevada v. Herrington*, 777 F.2d 529 (9th Cir. 1985); *Cf. Investment Institute v. Camp*, 401 U.S. 617, 620 (1971). Nevada is in the "zone of interests" to challenge BLM's failure to comply with NEPA, 42 U.S.C. §§ 4321 et seq. *See, e.g., City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975). Nevada is in the "zone of interests" with respect to the FLPMA provisions which provide for withdrawals of lands and related access authorizations for the benefit of other federal agencies. Nevada is obviously in the zone of interests of the constitutional guarantees as *Nevada v. Watkins* attests.

Nevada, therefore, has standing, to insist that the substantive and procedural protection of NEPA, FLPMA and the NWPA are

complied with by the BLM in its approval of land access authorizations which will permit the site characterization program to proceed. The Ninth Circuit Court of Appeals did not address Nevada's "zone of interests" arguments.

C. The Prudential Limitations Were Misapplied By The Lower Court To Deny Nevada's Sovereign And Quasi-Sovereign *Parens Patriae* Standing

The "generalized or abstract grievance" test employed by both the District Court, 708 F. Supp. at 295-297, App. pp. 30 to 38, and the Ninth Circuit Court (App. p. 7) was inappropriate because it encompasses prudential rather than Article III standing criteria. *See Allen v. Wright, supra,* at 751. Nevertheless, the Ninth Circuit Court agreed with the District Court "that Nevada's claims merely 'constitute a generalized grievance that the [Bureau] is not acting in a way in which [Nevada] maintains is in accordance with federal

laws . . . .' This is insufficient to demonstrate standing." App. p. 7. State challenges to public land decisions which are violative of State laws and policy, are not merely "generalized grievances" but implicate serious injuries to State governmental prerogatives and sovereign interests. *See* section D. for examples of those injuries, *infra*, at p. 57.

Nevada's land mass is 87 percent owned by the Federal Government. Of the remaining 13 percent, approximately 6 percent was granted to the railroads as an incentive for railroad construction. *Cf. United States v. Leo Sheep Co.*, 440 U.S. 668 (1979).

The District Court and the Court of Appeals denied Nevada's standing to complain of BLM's decision affecting the classification and use of land on and around Yucca Mountain which Nevada contended was made in violation of federal

law. Both the District Court and the Ninth Circuit Court of Appeals emphasized that: "The federal government, not Nevada, owns the land in question." App. p. 7. Equating Nevada's standing with the usual standing criteria applied to private organizations, both Courts also found significance in the fact that "Nevada did not allege in its complaint that it uses the land surrounding Yucca Mountain for any purpose." App. p. 7, 708 F. Supp. at 295, App. p. 31.

The lower courts applied standards of standing even more stringent than that imposed on private organizations seeking review of changes in public land classifications and changes in use patterns. In one of the most recent standing cases, *Lujan v. National Wildlife Federation, supra*, this Court denied the National Wildlife Federation representational standing to complain of

changes in public land classifications which the NWF contended were illegal, but as to discrete tracts of land that a member or members actually used, the NWF could achieve standing as a representative of its members to challenge land classification decisions affecting the discrete tracts of land.

Nevada is precluded from representing individual citizens because of the nominal party plaintiff rule. *See, e.g., Alfred L. Snapp & Sons Inc., v. Puerto Rico*, 458 U.S. 592, 607 (1982). As to the State's general representation of its citizens, the lower court denied Nevada a similar representational capacity generally accorded private organizations:

> Nevada alleges that it has standing in its *parens patriae* capacity to advance the interests of its citizens . . . . Although the Supreme Court has endorsed *parens patriae* suits in general, it has also stated that [a] State does not have standing as *parens patriae* to bring an action against the Federal Government. *Snapp* [citing *Alfred L.*

> *Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592] at 610 n.16 (stating that with respect to the citizens' rights in relation to the federal government, 'it is the United States, and not the State, which represents them as *parens patriae*').

In order to reach the conclusion that Nevada does not have standing in a representational capacity relative to its citizens, the Ninth Circuit Court of Appeals ruled that its "case of *Washington Utilities & Transportation Commission v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975), must, of course, give way to the Supreme Court's clear statement in *Snapp*." App. p. 9. The statement in *Snapp*, however, is not so clear.

In *Snapp*, four members of this Court, in dicta, announced that "A State does not have standing as *parens patriae* to bring an action against the Federal Government." 458 U.S. at 610, n.16. Three concurring members joined Justice Brennan, however, and stated:

> In cases such as the present one, I can discern no basis either in the Constitution or in policy for denying a State the opportunity to vindicate the federal rights of its citizens. At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations.

The concurring opinion of four members of this Court created an internal conflict with the dicta announced by the four other members in footnote 16 of *Snapp*.

Private organizations have standing to vindicate the federal rights of a member or members against the Federal Government. If Nevada is to be accorded the same representational rights to enforce the rights of its citizens as a private organization, why is its standing to be denied, unlike that of a private organization, when it sues the Federal Government? The answer, it would seem, is that standing in the circumstance where a state sues the Federal Government in the representational capacity known as *parens*

patriae, for the protection of its citizens, is not an Article III limitation on the jurisdiction of the federal courts, but a prudential limitation which must turn on the nature of the case. In this case, such prudential limitations have been abrogated by the policy of Congress in reducing Nevada's standing requirements to their Article III minima. The Ninth Circuit Court did not account for this distinguishing fact.

This Court has not foreclosed absolutely, as the Ninth Circuit Court held, suits in *parens patriae* against the Federal Government. In *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) this Court stated that:

> We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress . . . .

Nevada submits that this is a case in which this Court should grant certiorari

for the purpose of settling the important question of whether a state may bring an action *parens patriae* to protect its citizens against agency execution of unconstitutional acts of Congress in the judicial review circumstances of this case.

In this case, unlike the case in *Mellon* where general laws applicable to the national citizenry were involved, the BLM is attempting to execute a law of Congress which identified the State of Nevada and its citizens for invidiously discriminatory treatment. The presumption underlying this Court's dicta that the Federal Government, not the states, stands in *parens patriae* to the population of a state fails when the Federal Government singles out that state and its citizens for economically damaging treatment. The prudential presumption that the United States rather than the state is in the

relationship of *parens patriae* to the citizens of Nevada is inapposite in this circumstance.

D. The Lower Court Failed To Recognize That Nevada Has Standing To Complain Of Injuries To Its Sovereign Interests

Nevada alleged in paragraph 1.3 of the Complaint that it brought the action "in its sovereign capacity, its proprietary capacity and as *parens patriae* of its citizens." App. p. 62. Contrary to the Ninth Circuit Court's analysis, any and all of these bases establish standing.

The Nevada Legislature has enacted in NRS 328.065:

> An officer of an agency or instrumentality of the United States:
>
> * * *
>
> 4. Shall apply to the state land use planning agency pursuant to the procedure set forth in NRS 321.736 to 321.739, inclusive, for consent to use land held solely for proprietary purposes relating to the retention and management of the public lands, if that use interferes with the sovereignty of this state respecting the land within its borders.

No effort has been made by either the BLM or the DOE to comply with this statute. The Ninth Circuit Court of Appeals determined in *Nevada v. Watkins, supra*, that the Federal Government was acting pursuant to its Property Clause powers in developing the lands at Yucca Mountain for a federal high-level radioactive waste repository. Thus, the federal agencies are acting in the Federal Government's proprietary capacity.[8] The Nevada Attorney General acting pursuant to NRS 328.500(2) determined that Nevada's sovereignty was impaired by the actions of the BLM officials and responded by bringing an action in the District Court. The State of Nevada, therefore, has identified a basis for standing in the exercise of its sovereign right to enforce its own laws which the Ninth Circuit Court

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[8]The Nevada Legislature has also enacted a law that proscribes the storage of high-level radioactive waste in Nevada as unlawful. *See* NRS 459.910. App. p. 167.

failed to address.

Nevada's sovereignty is impaired in other respects by the BLM's approval of the ROWR. Nevada's sovereign interest in the protection of its vital tourist industry was not addressed. Nevada argued before the Ninth Circuit Court that if site characterization is permitted to go forward on the basis of the ROWR, the specter of thousands of protestors converging on Yucca Mountain to demonstrate their displeasure is a likely event. Their presence would overload available State and county law enforcement resources. The State may be required to provide medical and other social services for the throngs of people that may be attracted from all over the country. Add to this the potential for sabotage directed against either State or federal facilities, given the adverse public sentiment, the burden on State services

could be substantial. Personal injury and property damage, the prevention of which are interests which are within the State's protection, are probable. Irreversible environmental damage is also a probable threat particularly to endangered and protected species such as the desert tortoise and the fish-hook cactus and their habitats. These represent threatened injuries associated with site characterization and particularly site characterization under a public land access authorization such as an ROWR which does not carry with it sufficient federal jurisdiction to relieve the State from having to provide police and other forms of governmental protection. The Ninth Circuit Court ignored these arguments.

E. The Lower Court Mischaracterized Nevada's Standing To Complain Of Injuries To Its Proprietary Interests

Even though the United States owns most of the land on and around Yucca

Mountain, Nevada has proprietary interests in the vicinity of the ROWR. To the extent that property use and value are generally diminished by site characterization, the State's proprietary interests will be adversely affected. The Ninth Circuit Court ignored this argument, too.

The Ninth Circuit Court limited its inquiry as to Nevada's proprietary standing to a consideration of the disturbance of the affected land on and beneath Yucca Mountain. The Court then stated that "Nevada does not own the affected property for any purpose, nor has it alleged that it uses the property for any purpose. Nevada has failed to show that *it* will suffer on account of that disturbance. Proprietary standing is therefore not available to Nevada." App. p. 9. The Court applied a superficially inadequate treatment to Nevada's alleged

proprietary standing.

F. The Lower Court Refused To Recognize Nevada's Standing To Complain Of Constitutional Infringement Of Nevada's Rights As A Member Of The Union Of States

Nevada alleged in Paragraph 3.2 of its Complaint that:

> The acts of Defendants raise constitutional issues of the highest order involving the land-holding function of the United States . . . . Unless the Defendants are permanently restrained and enjoined, Nevada's equal footing and Tenth Amendment rights will be seriously diminished to the detriment of Nevada and the Union of States.

App. p. 76.

In its Fourth Cause of Action Nevada requested declaratory relief and particularly "for a declaration of the constitutionality of the FLPMA, NWPA and NWPAA (the 1987 Amendments to the NWPA) to the extent these statutes are relied upon for the land use authorization." App. pp. 79 to 80.

The Ninth Circuit Court of Appeals did not address Nevada's standing based

upon the alleged infringement of its constitutional rights. The District Court addressed selected constitutional issues even though it did not recognize their alleged violation as a basis for standing. Certain issues, of particular concern to Nevada, were not addressed at all.

Where a state is alleging constitutional infringement of its rights by agency action, the standing issue can be answered confidently without any additional factual allegations or inquiry. *Cf. Larson v. Valente*, 456 U.S. 228, 241 (1982); "[W]hen constitutional questions are in issue, the availability of judicial review is presumed . . . ." *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

Nevada complains of agency action which executes discriminatory treatment and constitutionally impairs Nevada's sovereignty in relation to that enjoyed by other states and in relation to accepted

notions of federalism. *See Coyle v. Oklahoma*, 221 U.S. 559 (1911).

In Paragraph 4.3 of its complaint (App. p. 79), Nevada alleged:

> Plaintiff State of Nevada is entitled to a decree which declares that the action of the Defendants is null and void for the reasons that the *nature and degree of infringement* upon an unconsenting state's sovereignty and equal footing under the circumstances of this case and particularly upon Nevada's sovereignty and equal footing is not authorized by any power exercisable under the Constitution. (Emphasis added).

This is not the document to demonstrate that the "nature and degree of infringement" upon Nevada's sovereignty and equal footing is impermissible in the circumstances of this case. That is a factual issue raising questions of degree which more appropriately should be reserved for a trial on the merits. Nevada's contention, herein, is only that it is entitled to a trial and has standing to pursue its remedy in the federal

courts.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEVADA,

Petitioner,

v.

CY JAMISON, Director of the Bureau of Land Management, Department of Interior; BILLY R. TEMPLETON, Nevada State Director, Bureau of Land Management, Department of Interior,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF NEVADA,
Plaintiff-Appellant,

v.

ROBERT F. BURFORD, Director of Bureau of Land Management, Department of Interior; EDWARD F. SPANG, Nevada State Director, Bureau of Land Management, Department of Interior,
Defendants-Appellees.

No. 89-15272
D.C. No. CV-88-0203-PMP
OPINION

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
August 16, 1990—San Francisco, California

Filed November 14, 1990

Before: J. Clifford Wallace, Arthur L. Alarcon and Charles Wiggins, Circuit Judges.

Opinion by Judge Wallace

SUMMARY

Constitutional Law/Jurisdiction

Affirming a district court dismissal of an action for lack of standing, the court of appeals held that Nevada failed to show

how a grant of a right-of-way by the Bureau of Land Management to the Department of Energy to conduct site characterization studies at Yucca Mountain for the repository of nuclear waste caused it injury in fact to challenge that action.

Under the Waste Act, the Department of Energy obtained a right-of-way over public land near Yucca Mountain in the State of Nevada from the Bureau of Land Management to evaluate the suitability of a site for the location of a repository for nuclear waste. The right-of-way granted prohibited the disposal of any hazardous materials on the land, and stated that it did not convey any rights for the construction or initial operation of a nuclear waste repository. The district court dismissed Nevada's action to challenge the grant of the right-of-way for lack of standing. The district court also concluded that Nevada's constitutional claims were without merit.

[1] The "case or controversy" limitation in article III of the Constitution requires that federal courts visit the threshold question of standing in every federal case. To clear this jurisdictional hurdle, a complaining party must demonstrate an injury in fact. [2] Nevada's complaint was silent as to how the alleged violations resulted in injury to Nevada. The federal government owned the land in question. In addition, Nevada did not allege in its complaint that it uses the land surrounding Yucca Mountain for any purpose. Even assuming that the right-of-way grant violates the Land Act, the Environmental Act, and the Constitution, Nevada failed to show how those violations resulted in injury to that state. Nevada's asserted right to have the federal government act in accordance with law was not sufficient, standing alone, to confer jurisdiction on a federal court. [3] Nevada's claim of standing on the basis of its sovereign interest failed. Clearly, the right-of-way decision did not strip Nevada of its right to participate in the site characterization process or to object to the selection of Yucca Mountain as a repository. [4] Nevada's asserted proprietary interest as a basis for standing also failed. Even assuming that the site characterization process would disturb the land,

Nevada failed to show that it would suffer on account of that disturbance. [5] Nevada could also not seek standing in its *parens patriae* capacity to advance the interests of its citizens. The Supreme Court has stated clearly that a state does not have standing as *parens patriae* to bring an action against the federal government. [6] Because Nevada failed to allege sufficient facts to demonstrate standing, the district court properly dismissed its action. The court did not reach the question of whether the district court was correct in dismissing Nevada's claims on the merits.

COUNSEL

Harry W. Swainston, Deputy Attorney General, Carson City, Nevada, for the plaintiff-appellant.

George W. Vancleve, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

WALLACE, Circuit Judge:

Nevada appeals from the dismissal of its complaint against the Bureau of Land Management (Bureau), in which Nevada alleges that the Bureau improperly granted a right-of-way to the Department of Energy (Department) to conduct site characterization studies at Yucca Mountain, Nevada. The district court concluded that Nevada lacked standing to pursue this action, and dismissed the complaint. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. Our court has no jurisdiction to review a dismissed complaint; a judgment is not final until the underlying action is dismissed. Where the district court has inadvertently neglected to dismiss the action but it is clear it intended its order to terminate the

action, we treat the action as dismissed. *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 855-56 (9th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). Here it is clear that the ruling by the district court was meant to be dispositive of the action. Therefore, we have jurisdiction over this timely appeal under 28 U.S.C. § 1291. We affirm.

I

In February of 1983, Nevada was notified that certain public lands near Yucca Mountain were under consideration as a national repository for the disposal of nuclear waste. Four years later, Congress decided to concentrate waste repository development efforts on the Yucca Mountain site. Accordingly, Congress amended the Nuclear Waste Policy Act (Waste Act), 42 U.S.C. §§ 10101-10270, to require that site characterization activities proceed solely at Yucca Mountain. *Id.* § 10133(a). Site characterization consists of extensive testing conducted by the Department in order to evaluate the suitability of a site for the location of a repository. *Id.* § 10101(21).

In order to aid the Department in its site characterization activities, the Waste Act provides,

> [t]o the extent that the taking of any action related to the site characterization of a site . . . requires a certificate, *right-of-way*, permit, lease, or other authorization from a Federal agency or officer, such agency or officer shall issue or grant any such authorization at the earliest practicable date, to the extent permitted by the applicable provisions of law administered by such agency or officer.

42 U.S.C. § 10140(1) (emphasis added). Pursuant to this section, the Department applied to the Bureau in November 1987 for a right-of-way over public land near Yucca Mountain. This land is administered by the Bureau under the Fed-

eral Land Policy and Management Act of 1976 (Land Act), 43 U.S.C. §§ 1701-1784 which directs the Bureau to manage the land in a way "that will best meet the present and future needs of the American people." *Id.* § 1702(c). On January 6, 1988, the Bureau granted to the Department a 13 year right-of-way over 51,632 public acres near Yucca Mountain, and authorized the Department to undertake necessary site characterization activities on that land in accordance with the Department's Plan of Development.

Under this plan, the Department intends to excavate several exploratory shafts and conduct a variety of scientific tests. The Department has stated that site characterization activities should not interfere with any current or planned activities on the lands within the right-of-way. It promises "to return lands disturbed by site characterization to a stable ecological state with a form and productivity similar to the predisturbance state." Moreover, the right-of-way granted by the Bureau prohibits the disposal of any hazardous materials on the land, and states that it "does not convey any rights for the construction or initial operation of a nuclear waste repository."

Nevada filed an action in the district court challenging the grant of this right-of-way. Nevada alleged that the grant violated requirements in both the Land Act and the National Environmental Policy Act (Environmental Act). In addition, it claimed that the Bureau's actions violated Nevada's constitutional right, including that the right-of-way rendered meaningless Nevada's political right to object to its selection as a waste repository site. The district court determined that Nevada lacked standing to pursue the action, and concluded that the constitutional claims were without merit.

II

We review de novo the district court's legal conclusion that Nevada lacks standing. *Bruce v. United States*, 759 F.2d 755,

758 (9th Cir. 1985), *cert. denied*, 479 U.S. 987 (1986). Moreover, for purposes of this review, we must construe the complaint in favor of Nevada, and accept as true all of Nevada's material allegations. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

[1] The "case or controversy" limitation in article III of the Constitution requires that federal courts visit the "threshold question" of standing in every federal case. *Id.* at 498. In order to clear this jurisdictional hurdle, a complaining party must demonstrate an injury in fact. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) (*Valley Forge*). The Supreme Court has held that this constitutional injury requirement embraces three related elements: (1) an actual or threatened injury, (2) which is fairly traceable to the defendant's allegedly unlawful conduct, and (3) which is likely to be redressed by the relief requested. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (*Allen*); *Valley Forge*, 454 U.S. at 472; *Alaska Fish & Wildlife Federation v. Dunkle*, 829 F.2d 933, 937 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988).

To satisfy the first of these requirements, Nevada must show that it "has been or will in fact be perceptibly harmed by" the decision of the Bureau to grant the right-of-way. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973). Thus, Nevada must demonstrate that it has suffered or will in fact suffer "concrete and immediate" injury on account of the right-of-way grant. *Rapid Transit Advocates, Inc. v. Southern California Rapid Transit District*, 752 F.2d 373, 378 (9th Cir. 1985). This it has failed to do.

Nevada's complaint contains allegations that the Bureau's decision to issue the right-of-way violated several constitutional and statutory provisions. For example, Nevada contends that the Bureau violated requirements of the Land Act by issuing the right-of-way because in order to permit the

Department to occupy the land surrounding Yucca Mountain, the Bureau was required to use the withdrawal procedure specified in 43 U.S.C. § 1714. Nevada further argues that the environmental assessment accepted by the Bureau in connection with the right-of-way grant is insufficient to satisfy the requirements imposed by the Environmental Act. In addition, Nevada contends that issuance of the right-of-way violates many constitutional provisions, including the tenth amendment.

[2] However, the complaint is silent as to how these alleged violations have resulted in injury to Nevada. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen,* 468 U.S. at 754; *see also Diamond v. Charles,* 476 U.S. 54, 62 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."). The federal government, not Nevada, owns the land in question. Moreover, Nevada did not allege in its complaint that it uses the land surrounding Yucca Mountain for any purpose. Even assuming that the right-of-way grant violates the Land Act, the Environmental Act, and the Constitution, Nevada fails to show how those violations result in injury to Nevada. We agree with the district court that Nevada's claims merely "constitute a generalized grievance that the [Bureau] is not acting in a way in which [Nevada] maintains is in accordance" with federal laws. *Nevada v. Burford,* 708 F. Supp. 289, 295 (D. Nev. 1989) (*Burford*). This is insufficient to demonstrate standing. *See Allen,* 468 U.S. at 754; *Valley Forge,* 454 U.S. at 482-83; *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 223 n.13 (1974).

[3] In addition to contending that the right-of-way grant violated several federal statutes and the Constitution, Nevada asserts that its political right to object to its selection as the host for a nuclear waste repository has been rendered meaningless by the Bureau's action. It is clear that a state may

demonstrate standing by asserting an injury to a sovereign interest. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982) (*Snapp*). What constitutes a state's sovereign interest is not free from doubt. *Id.* But in this appeal, we need not analyze its nature or parameters. Nevada argues that one of its sovereign interests — the right to object in the political arena to the selection of Yucca Mountain as a waste repository — has been infringed. Assuming such an identifiable sovereign interest, Nevada's argument ignores the fact that the decision of whether to construct the repository at Yucca Mountain is many years and numerous procedural hurdles away. For example, if the Department determines that Yucca Mountain is an appropriate site after site characterization is completed, the Department must hold public hearings near the site to receive comments regarding its suitability. 42 U.S.C. § 10134(a). Following this, the Department must make a recommendation to the President whether to construct the repository, who in turn must decide whether to recommend the site to Congress. *Id.* Within 60 days of the President's recommendation to Congress, the state in which the recommended site is located may file a notice of disapproval with Congress. *Id.* § 10136(b)(2). If such a notice is filed, the site selection is disapproved unless Congress passes a resolution as required by the Waste Act within 90 days. *Id.* § 10135(c). We deal here only with the decision by the Bureau to grant a right-of-way, the only "direct consequence [of which] is that the site characterization process will proceed to the next step in accordance with the [Waste Act]." *Burford*, 708 F. Supp. at 297. Any claim by Nevada that site characterization will inevitably lead to the designation of Yucca Mountain as a repository site is mere speculation, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976). Clearly, the right-of-way decision has not stripped Nevada of its right to participate in the site characterization process or of its right to object to the selection of Yucca Mountain as a repository. Thus, because

Nevada has failed to show how it has been injured in this respect, its claim of standing based on its asserted sovereign interest fails.

[4] In its complaint, Nevada also alleges that the site characterization process will disturb the surface and subsurface of the land in the affected area, and will interfere with other possible uses of the land. A state may, of course, have standing to redress injuries to its proprietary interests, such as the interests arising from property ownership. *Snapp*, 458 U.S. at 602-03. As we have discussed above, however, Nevada does not own the affected property, nor has it alleged that it uses the property for any purpose. Thus, even assuming that the site characterization process will disturb the land, Nevada has failed to show that *it* will suffer on account of that disturbance. Proprietary standing is therefore not available to Nevada.

[5] Finally, Nevada alleges that it has standing in its *parens patriae* capacity to advance the interests of its citizens. The Supreme Court has held that a state has a "quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general," and can therefore sue to protect these interests through a *parens patriae* action. *Id.* at 607. In this case, Nevada alleges that the selection of Yucca Mountain as the site for a national waste repository will have a devastating effect on the state's vital tourist industry. Although the Supreme Court has endorsed *parens patriae* suits in general, it has also stated that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n.16 (stating that with respect to the citizens' rights in relation to the federal government, "it is the United States, and not the State, which represents them as *parens patriae*"). Our earlier case of *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, 1153 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), must, of course, give way to the Supreme Court's clear statement in *Snapp*.

[6] Because Nevada has failed to allege sufficient facts to demonstrate standing, we affirm the district court's dismissal of the action. We therefore do not reach the question of whether the district court was correct in dismissing Nevada's claims on the merits.

AFFIRMED.

DISTRICT COURT'S CORRECTED ORDER

708 F. SUPP. 289 (D.NEV. 1989)

The STATE OF NEVADA, Plaintiff,

v.

Robert F. BURFORD, Director, Bureau of Land Management, Department of the Interior, Edward F. Spang, Nevada State Director, Bureau of Land Management, Department of the Interior, Defendants.

No. CV-S-88-203-PMP (RJJ).

United States District Court,

D. Nevada.

Jan. 27, 1989.

As Corrected March 9, 1989.

ORDER DISMISSING COMPLAINT

PRO, District Judge.

The State of Nevada filed a "Complaint for Mandamus, Injunctive and Declaratory Relief and for Judicial Review" (#1) on March 25, 1988. in which it seeks to overturn the Bureau of Land Management's ("BLM") decision to issue a

right-of-way reservation ("ROWR") which authorizes the Department of Energy ("DOE") to occupy, use and develop public lands near Yucca Mountain, in southwestern Nevada. Pursuant to the ROWR, DOE plans to study Yucca Mountain's characteristics as a possible site for a repository of high-level radioactive waste and spent nuclear fuel.

Nevada's Complaint alleges four causes of action. The first cause of action is a collection of claims, all of which seek this Court to rescind the BLM's issuance of the ROWR to the DOE. (#1, ¶¶ 1.1-1.18, at 1-8)[1] The second

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[1]The BLM focuses on the gravamen of Nevada's claims by summarizing the allegations contained in the Complaint as follows:

> BLM's issuance of a right-of-way is contrary to FLPMA and the order classifying management of the public lands under the Classification and Multiple Use Act of 1964 because it authorizes the Department of Energy to undertake activities inconsistent with valid, existing uses and that extensively disrupt the surface and subsurface;
> To the extent the right-of-way authorizes the Department of Energy to undertake activities inconsistent with valid, existing uses, it in fact classifies anew

cause of action claims that the BLM arbitrarily and unlawfully refuses to grant Miflin and Associates, a private enterprise under contract with Nevada, a right-of-way for access to study Yucca Mountain's characteristics as a possible site for the repository. The third cause of action claims that the BLM's issuance of the RCWR to the DOE unconstitutionally infringes on Nevada's equal footing and other rights reserved to the States by the Tenth Amendment. Finally, the fourth cause of action claims that no power exercisable under the Constitution authorizes the BLM's grant of the ROWR to the DOE.

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or withdraws the public lands without observance to the procedure and substance of FLPMA; and
BLM's finding that the right-of-way authorizes activities that do not pose a significant impact on the environment is unreasonable because the environmental assessment supporting it relies upon a document of the Department of Energy that fails to satisfy the National Environmental Policy Act, 42 U.S.C. § 4321.
(Citing Complaint, #1, ¶¶ 1.12-1.14 at 6-8)

Nevada seeks (1) an order directing the BLM to rescind the ROWR granted to the DOE; (2) and order directing the BLM to grant a right-of-way permit to Miflin & Associates; (3) declaratory judgment to enjoin the BLM from permitting DOE access to Yucca Mountain that would "entail unlawful infringement upon Nevada's constitutional and political rights"; and (4) declaratory judgment as to the constitutionality of those federal statutes upon which the BLM relied in granting the ROWR to the DOE.

On June 2, 1988, the BLM filed a Motion to Dismiss (#15), for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). Specifically, the BLM asserts that Nevada lacks standing to raise the first, third, and fourth causes of action, and that the second cause of action is not yet ripe for judicial review. In addition, the BLM asserts

that Nevada's third and fourth causes of action fail to state a claim upon which this Court can grant relief. Fed.R.Civ.P. 12(b)(6).

The State of Nevada filed an Opposition (#19) to the BLM's Motion to Dismiss on July 15, 1988, to which the BLM filed a Reply (#21) on August 15, 1988.

For the reasons discussed herein, this Court accepts the BLM's assertions, and therefore dismisses the State of Nevada's Complaint.

PLEADING REQUIREMENTS

For purposes of the BLM's Motion to Dismiss, the factual allegations of the Nevada's Complaint must be presumed as true, and this court must draw all reasonable inferences in favor of Nevada, the non-moving party. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). This court does not, however,

necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. den.* 454 U.S. 1031, 102 S.Ct. 567, 70 L.Ed.2d 474 (1981). The liberal reading accorded complaints on 12(b)(6) motions is, moreover, subject to the requirement that the facts demonstrating standing must be clearly alleged in the complaint. *Id.* (We cannot construe the complaint so liberally as to extend our jurisdiction beyond its constitutional limits."), citing *Jenkins v. McKeithen*, 395 U.S. 411, 422, 89 S.Ct. 1843, 1849, 23 L.Ed.2d 404 (1969); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 237 n. 7 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980).

In addition, this court may take

judicial notice of facts outside the pleadings such as matters of public record, without converting BLM's Motion to Dismiss to one for summary judgment. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

BACKGROUND

In February 1983, pursuant to the Nuclear Waste Policy Act of 1982 ("NWPA"), 42 U.S.C. § 10101 (1982), Nevada was notified that certain public lands near Yucca Mountain were under consideration as a repository for the disposal and storage of high-level radioactive waste and spent nuclear fuel.[2] The BLM administers the lands in

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[2]The NWPA entrusts the Secretary of Energy with the responsibility of identifying a site suitable for study as a potential repository for the storage of radioactive waste and spent nuclear fuel. 42 U.S.C. § 10101, *in passim*. The statute first requires the Secretary to issue guidelines for selecting possible sites in various geologic media. 42 U.S.C. § 10132(a) (1982). Second, the Secretary is to use those guidelines to nominate at least five sites that warrant intensive study, statutorily termed as

question under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 ("FLMPA"). FLMPA directs that management of public lands shall be "on the basis of multiple use." 43 U.S.C.

"site characterization." 42 U.S.C. § 10132(b) (1982). An environmental assessment must accompany each of the nominations, which must "include a detailed statement of the basis for such recommendation and of the probable impacts of the site characterization activities planned for such site, and a discussion of alternative activities relating to site characterization that may be undertaken to avoid such impacts." 42 U.S.C. § 10132(b)(1)(E) (1982). After nominating at least five sites, the Secretary must recommend three for site characterization to the President. 42 U.S.C. § 10132(b)(1)(B) (1982). If the President approves that recommendation, the Secretary is to begin site characterization at each locale. *See generally* 42 U.S.C. § 10133 (1982).

In 1986, the Secretary announced the nomination of five sites as suitable for site characterization. *See* 51 Fed.Reg. 19783-19784 (June 2, 1986). On the same day, the Secretary announced that he had recommended three of the sites, one in Deaf Smith County, Texas, one at Yucca Mountain, Nevada, and one on the Hanford Reservation in Washington, for site characterization, and that the President had approved that recommendation. In 1987, Congress amended the NWPA to the extent that site characterization was to proceed only at one site, Yucca Mountain, Nevada. (See discussion, *infra*.)

Upon completion of site characterization, the Secretary must recommend to the President a single site for development as a repository. 42 U.S.C. § 10134(a)(1) (1982). Finally, the President shall submit that recommendation to Congress, triggering an elaborate procedure which will determine whether that site can in fact be developed as a repository. 42 U.S.C. §§ 10134-10137 (1982).

§ 1701(a)(7) (1976).[3]

On November 23, 1987, the DOE filed an application with the BLM for a right-of-way reservation ("ROWR") in order to perform site characterization studies at the Yucca Mountain site. The application also sought a ROWR over federally-owned land adjacent to the public lands, within the Nellis Air Force Range.

On December 21, 1987, Congress enacted the Nuclear Waste Policy Act Amendments of 1987, Pub.L. No. 100-203, Title V, § 5002 (1987) (codified at 42 U.S.C. § 10101 (West Supp. 1988)). Pursuant to the 1987 Amendments, the Secretary of Energy is directed to undertake site characterization at only one locale, specifically, Yucca Mountain. Pub.L. 100-203, Title V, § 5011(e)-(g)

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[3]Multiple use is described as "making the most judicious use of the land for some or all of the public lands," and, where appropriate, allowing individuals to "use some land for less than all of the resources." 43 U.S.C. § 1702(c) (1976).

(1987); 42 U.S.C. § 10133(a)-(c) (West Supp. 1988).[4]

The 1987 Amendments do not, however, alter the one provision contained in the NWPA which regulates the role of the BLM insofar as granting access to Yucca Mountain for site characterization. Namely, section 120(a)(1), which provides in pertinent part:

> To the extent that the taking of any action related to the site characterization of a site . . . under this part requires a certificate, *right-of-way*, permit, lease, or other authorization from a Federal agency or officer, such agency or officer *shall issue or grant such authorization* at the earliest practicable date, *to the extent permitted by the applicable provisions of law* administered by such agency or officer . . . .
>
> * * *
>
> Any authorization issued or granted pursuant to . . . this section shall include such terms and conditions as

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[4]The Amendments explicitly state that if the Secretary determines during the site characterization work that Yucca Mountain is unsuitable for development as a repository, he shall terminate those activities and, within six months, provide recommendations on further action to Congress. Pub.L. 100-203, Title V, § 5011(g)(3) (1987); 42 U.S.C. § 10133(c)(3)(A)-(F) (West. Supp. 1988).

> may be required by law, and may include terms and conditions permitted by law. 42 U.S.C § 10140 (1982) (emphasis added).[5]

The BLM granted the ROWR to the DOE on January 6, 1988. The decision authorizes the DOE to undertake activities related to site characterization on 51,789 acres near Yucca Mountain. The ROWR extends only to the acreage which the BLM manages under FLPMA, it does not authorize DOE to undertake activities on the Nellis Air Force Range. On February 5, 1988, the State of Nevada, represented by the Nevada Attorney General, timely filed a Notice of Appeal, thereby initiating administrative review of the BLM's decision granting the ROWR by the

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[5]The BLM's Motion to Dismiss contains a concise discussion of its authority to allow the DOE to occupy and use public lands adjacent to Yucca Mountain for purposes of conducting site characterization. (#15, at 7-11) *See also* 43 U.S.C. § 1767 ("Rights of way for Federal departments and agencies"), *cross referenced* with 43 U.S.C. § 1732 ("Management of use, occupancy, and development of public lands").

Department of Interior Board of Land Appeals.[6]

Following Nevada's filing of this action, the Interior Board of Land Appeals granted Nevada's motion to stay the administrative proceedings pending the outcome of this action on August 3, 1988.

On September 30, 1987, Miflin and Associates, a private enterprise under contract with Nevada to independently assess Yucca Mountain's characteristics as a repository, applied to the BLM for access to the Yucca Mountain site for geologic and hydrologic testing in connection with Nevada's oversight role. Nevada seeks a Writ of Mandamus to compel the BLM to grant Miflin and Associates,

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[6]The BLM incorporated DOE's environmental assessment, required under the NWPA. Nevada has claimed that the environmental assessment does not address the full range of issues required by the NWPA, and this contention is presently at issue before the Ninth Circuit Court of Appeals. *Nevada v. Herrington,* Case No. 86-7309. Accordingly, this court need not consider the adequacy of the environmental assessment.

as Nevada's contractor, a right-of-way to permit access for site characterization studies as part of Nevada's oversight and monitoring functions. In its Motion to Dismiss, the BLM states that it is currently considering Mifling and Associates' updated and corrected application.

STANDING DOCTRINE OVERVIEW

The BLM challenges the standing of Nevada to maintain this action. Standing is highly case-specific, and turns on the precise allegations of the party seeking relief. *Compare Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (denying standing to an environmental organization challenging development of a ski resort in a national forest because it failed to identify "specific injury" to members) *with United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (finding

pleadings alleged facts which, if true, would establish standing by environmental group to challenge Interstate Commerce Commission's allowance of rail freight increase which identified members whose recreational and aesthetic interests would be allegedly injured because rate increase would lead to heightened use of raw, instead of recycled, scrap metal).

Standing involves both limitations imposed by the "case or controversy" requirement of Article III of the Constitution and "prudential limits on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The standing doctrine limits the jurisdiction of federal courts to parties who demonstrate "injury in fact." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473, 102 S.Ct 752, 759, 70 L.Ed.2d 700 (1982).

The Supreme Court has the "injury in fact" requirement as embracing three separate, yet necessarily intertwined elements: The party invoking the court's authority must demonstrate (1) "some actual or threatened injury" that (2) "fairly can be traced to the challenged action" and (3) "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. at 472, 102 S.Ct at 758 (*quoting Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979), and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925-26, 48 L.Ed.2d 450 (1976), respectively). *See also Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

The first of these elements, that a

party "has been or will in fact be perceptibly harmed by the challenged agency action," *see United States v. SCRAP*, 412 U.S. at 688, 93 S.Ct. at 2416, is the core of standing. *National Wildlife Federation v. Hodel*, 839 F.2d 694, 704 (D.C.Cir. 1988). The requisite injury, however, cannot be to merely "abstract" interests. *See Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986); *Simon*, 426 U.S. at 40, 96 S.Ct. at 1925; *Sierra Club*, 405 U.S. at 739-740, 92 S.Ct. at 1368-69.

The second element is causation: the injury alleged must be "fairly traceable" to the challenged action. The Supreme Court has indicated that indirectness of causation is not necessarily a barrier to standing. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) (environmental group

had standing to challenge limitation on utility liability in event of nuclear accident); *see also Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (whale watching group had standing to challenge failure of Secretary of Commerce to cite Japan for violations of international limitations on harvesting of whales).

The third and final element of standing analysis is redressability. Differentiating "[t]he 'fairly traceable' and 'redressability' components of the constitutional standing inquiry," the Supreme Court observed that the causality inquiry "examines the causal connection between the [defendant's--here, the BLM's] assertedly unlawful conduct and the alleged injury" while the redressability inquiry "examines the causal connection between the alleged

injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. at 3326 n.19. In this case, the "redressability" requirement therefore demands that Nevada demonstrate that there is a "substantial likelihood" that the relief requested would preclude the BLM from issuing at some future date, the ROWR to the DOE, in accordance with NWPA and the FLPMA. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. at 75 n.20, 98 S.Ct. at 2631 n.20.

In addition, the courts have imposed standing limitations beyond those required by the Constitution. These prudential limitations arise from a concern that the courts not "be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be

unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. at 500, 95 S.Ct. at 2206.

Hence, the courts have held that when the alleged harm is a "generalized" or "abstract" grievance shared by a large class of citizens, jurisdiction will not be exercised. *Western Mining Council v. Watt*, 643 F.2d 618, 623 (9th Cir. 1981), *citing Warth v. Seldin*, 422 U.S. at 499, 95 S.Ct. at 2205; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Ex Parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937).

NEVADA FAILS TO DEMONSTRATE ACTUAL INJURY

The case or controversy requirement of Article III, which limits the jurisdiction of the federal courts, also

applies to actions under the Declaratory Judgments Act, 28 U.S.C. § 2201. *Western Min. Council v. Watt*, 643 F.2d at 623; *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776, 782 (9th Cir. 1979). Accordingly, the requirements for standing and justiciability apply to an action, such as Nevada's, for declaratory judgment. Thus, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Western Min. Council v. Watt*, 643 F.2d at 624, *quoting Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941).

[1] To satisfy the first element of the standing requirement, Nevada must

allege some threatened or actual injury resulting from the BLM's granting of the ROWR to the DOE. Nevada's Complaint contains no averments that the State uses the public lands adjacent to Yucca Mountain for any purpose. Instead, Nevada contends that the BLM's grant of the ROWR to the DOE contravenes FLPMA. In effect, Nevada's first, third, and fourth causes of action constitute a generalized grievance that the BLM is not acting in a way in which the State maintains is in accordance with the FLPMA and the Constitution.[7]

[2] In more specific terms,

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[7]This particular allegation does not, as a matter of law, confer standing upon Nevada. In *Allen v. Wright*, 468 U.S. at 754, 104 S.Ct. at 3326, the Supreme Court maintained:

> This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court . . . . "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." (Citations omitted).

Nevada's Complaint includes an allegation that site characterization can disturb the surface and subsurface of the public lands in the affected area, and with other uses. (#1, ¶1.14, at 7-8). Inasmuch as the area to be affected by the site characterization is public land administered by the BLM, Nevada has not indicated any proprietary or sovereign interests in such public lands.

Beyond this, in the most generalized terms, Nevada contends in its Opposition to the BLM's Motion to Dismiss (though not in its Complaint) that grave consequences shall befall the State and its citizens if, at the culmination of the NWPA process, Yucca Mountain is indeed utilized as a repository.[8]

The Court does not discount or

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[8]Cited as "specific examples of direct injury to Nevada's sovereign and quasi-sovereign interests," Nevada discusses the polarization of the population and political infrastructure, and the potentially negative influence a repository would have on the state's image as a tourist destination. (#19 at 26-27)

minimize the concerns expressed by Nevada, but recognizes as well that the NWPA process is not complete and no final determination has yet been made as to the utilization of Yucca Mountain as a repository. Nevada's allegations of potential harm are, however, at this time insufficient to establish that the State of Nevada has or will subject to actual injury due to the BLM's action permitting the DOE to proceed with site characterization studies at Yucca Mountain.[9]

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[9]The BLM's Reply Memorandum cogently responds to Nevada's "specific examples" as follows:

> Each [example of "direct injury"] lacks any referent [sic] in the Complaint . . . . The first example also apparently presumes that Nevada's sovereign and quasi-sovereign interests encompass political unanimity among its citizens and institutions. The absence of authority for the proposition is telling. The second example depends upon the existence of a repository. But BLM's decision only authorizes DOE to occupy, use and develop the public lands to study their characteristics for a site. If and when a repository may be built is numerous decisions away, *all to be made by agencies and institutions other than the BLM*. The harm averred, thus, lacks any causality to the [BLM] decision in question.
> (#21, at 25-26, n.5) (emphasis added).

Indeed, the Supreme Court has held that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin,* 422 U.S. at 499, 95 S.Ct. at 2205. Similarly, in the context of a state taxpayer challenge to federal statutes in *Flast v. Cohen*, 392 U.S. 83, 106, 88 S.Ct. 1942, 1956, 20 L.Ed.2d 947 (1968), the Supreme Court noted that standing requirements exist so that courts will not be asked to adjudicate "generalized grievances about the conduct of government or the allocation of power in the Federal System."

[3] Nevada further alleges that its interests have been sacrificed at the alter of political expediencey by the elected representatives of her sister

states, inasmuch that if the nuclear waste repository is eventually established at Yucca Mountain, the citizens of Nevada will be at a disproportionate risk of accident. That a particular federal law, the NWPA is this case, affects Nevada more significantly than her sister stats (some of which might not be affected at all), is insufficient to sustain standing.

Allegations of a federal statute's disproportionate impact has been considered before in this circuit in the context of standing requirements. In *Western Min. Council v. Watt*, 643 F.2d 618 (9th Cir. 1981), *supra* various plaintiffs sought a declaratory judgment rendering all or part of the FLPMA unconstitutional. The plaintiffs argued that since some states contain less public land than does California, the FLPMA injured them as California

taxpayers because it restricted California's tax base, causing an increase in the amount of taxes which plaintiffs had to pay. *Id.* at 630.

The Ninth Circuit panel affirmed the district court's dismissal for failure to state a claim upon which relief could be granted, on the grounds that the plaintiffs lacked standing:

> The increase in state taxes allegedly suffered by plaintiffs is at best a *highly generalized injury*. A great many federal statutes potentially affect the level of state taxes. Here, plaintiffs' interest in the effect of the retention and reimbursement policies [regarding the administration of public lands pursuant to FLPMA] on state taxes is shared in somewhat differing degrees by the taxpayers of all states which contain public lands. We hold that this interest is insufficient to give plaintiffs standing to challenge the constitutionality of [the FLPM]. *We do not sit to pass judgment on congressional declarations of policy which affect plaintiffs only in an attenuated and generalized way. Plaintiffs must look to the legislative branch for redress of such generalized grievances.* *Id.* at 632 (emphasis added).

In conclusion, even assuming *arguendo*, that the BLM 's action is violative of the FLPMA and/or the NWPA, Nevada has nonetheless failed to demonstrate "actual injury" that is "fairly traceable" to the challenged conduct and "likely to be redressed by the requested relief." The only direct consequence flowing from the complained BLM action is that the site characterization process will proceed to the next step in accordance with the NWPA.[10] Any potential risks which may be created by the eventual establishment of a nuclear waste repository at Yucca Mountain will be justiciable, if at all, following the completion of all

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[10]The site characterization at Yucca Mountain must proceed according to the procedural scheme established by the NWPA, which provide for the State of Nevada opportunities to monitor the process, provide input, make recommendations, receive financial assistance, and appeal. 42 U.S.C. §§ 10134-10137. In sum, numerous steps mandated by the NWPA prior to the establishment of a repository at Yucca Mountain have yet to commence.

preliminary studies conducted and all procedural steps undertaken, pursuant to the NWPA.

NEVADA'S PARTICIPATION RIGHTS UNDER THE NWPA INSUFFICIENT TO CONFER STANDING TO CHALLENGE BLM ACTION

[4] Nevada asserts that its oversight role under the NWPA confers standing to insist that the BLM perform its duties according to the applicable statutes. Nevada's Complaint does not allege a violation of the NWPA. Rather, Nevada asserts that the BLM's grant of the ROWR to the DOE violated the FLPMA, which in turn, prejudices Nevada's oversight role as provided for in the NWPA. This contention is without merit.

This Court is cognizant of *Nevada ex rel. Loux v. Herrington*, 777 F.2d 529 (9th Cir. 1985) ("Nevada I"), which held that Nevada had standing to contest DOE's

decision to deny funding for Nevada's expenditures on studies designed to evaluate whether Yucca Mountain should be used as a repository, and declared unlawful DOE's guidelines on site characterization phase grants. The decision is not, however, inconsistent with the BLM's contention that Nevada lacks standing to seek declaratory relief in this action.

In *Nevada I,* DOE denied funding for Nevada's proposed site characterization studies for fiscal year 1985, relying on internal guidelines authorized by the NWPA. The Ninth Circuit panel appropriately noted that the NWPA authorized funding for state studies as soon as the state had been notified that it hosts a potential site. *Nevada I,* 777 F.2d 529 at 533, *citing* 42 U.S.C. § 10121(b). The denial of such federal funds therefore had a "direct and

immediate" effect on Nevada's testing activities, "discouraging the state from embarking on the lengthy and detailed independent site studies that would allow it to fully evaluate DOE's conclusions." *Id.*, at 535. The court concluded that the denial of funds created a dilemma not contemplated by the NWPA:

> The state must therefore choose now between "disadvantageous compliance and rising sanctions,"--either to restrict its testing to those forms which would be funded under the Guidelines even though its evaluation of DOE's studies would thereby be impaired, or to perform such testing at its own expense. Resolution of the Guidelines now will foster, rather than impede, effective administration of the Fund by DOE since DOE's decision to fund the states' ongoing budget requests will necessarily be controlled by the challenged Guidelines. *Id.*, (citations omitted).

No such "Hobson's choice" confronts Nevada in this case. The BLM's action at issue here is simply a step in the site characterization process authorized by the NWPA. The BLM grant of the ROWR to

the DOE does not preclude Nevada from conducting any activity authorized by the NWPA. If the BLM's action precluded Nevada from participating in the site characterization process, Nevada might well have standing to argue deprivation of its statutory rights. However, the BLM's grant of the ROWR to the DOE does not have any effect that even remotely prejudices Nevada's right to conduct its own site studies. As such, the BLM's action cannot be construed as prejudicing Nevada's statutory participation rights in the repository siting process.

Indeed, in *Nevada v. Herrington*, 827 F.2d 1394 (9th Cir. 1987) ("Nevada II"), which cogently summarizes the potential host state's "cooperative and concurrence role" in the repository siting process pursuant to the NWPA, *Id.* at 1397, the Ninth Circuit denied several states' (including Nevada's) petition for review

of the DOE's decision that states could not use grant monies from the Nuclear Waste Fund to finance their participation in judicial review proceedings pursuant to the NWPA:

> The states contend that the language of section 10136 ["Participation of States"] itself mandates funding for judicial review because on its face it authorizes funding of "review" of [DOE's] activities under the [NWPA]. When we look to the context of the word "review," however, we find the more plausible construction of the word is that it is limited to a state's independent evaluation of siting activities and does *not encompass a court's review*. Section 10136(c)(1)(B) sets forth an exhaustive list of activities for which a state may use grant funds. The express language of this section provides that ["the Secretary shall make grants to the State of Nevada and any affected unit of local government for the purpose of enabling such State or affected unit of local government]--(i) to review activities taken under [this part (of the NWPA) with respect to the Yucca Mountain site."] Our interpretation of this provision as *limited to state review rather than federal court review* is consistent with the other enumerated activities specified in the section; activities involving [Nevada's] information gathering, evaluation, and dissemination to its residents. As

> we stated in *Nevada I*, the NWPA's state participation provisions authorized "independent oversight and peer review" by states. Neither the language of section 10136 nor its legislative history makes any reference to *judicial review*.
> The states also contend that funding for judicial review is mandated by section 10137(c)(11). That section provides that the consulation and cooperation agreement must specify procedures for resolving a state's objections "through negotiation, arbitration, or other appropriate mechanisms." Petitioners argue that "other appropriate mechanisms" include judicial review. This contention also fails.
>
> * * *
>
> This is not to say that the states have no access to the courts. Congress provided for judicial review in section 10139 of the [NWPA] and the states are free to challenge DOE's actions pursuant to this provision.
> *Id.* at 1399, 1400 (footnote, citation omitted) (emphasis added).[11]

Nevada's Complaint contains no allegations that the BLM acted to deny

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[11]The Nuclear Waste Policy Act Amendments of 1987, replaced, *inter alia*, the general reference "each State in which a candidate site for a repository is approved" with "the State of Nevada and any affected unit of local government. This change reflects the Congressional intent to focus on the Yucca Mountain site. This court sees nothing in the Amendments which would indicate a change in the Ninth Circuit's rationale in *Nevada II*.

Nevada any funds authorized by the NWPA. Morever, *Nevada I* and *Nevada II* clearly indicate that the "cooperative and concurrence role" in the site characterization program codified in the NWPA does not permit Nevada, as the potential host state of the repository, to stop the site characterization process. Rather, the terms of the NWPA indicate that Congress intended a parallel system of state and federal monitoring and planning, which could culminate in the establishment of a repository at Yucca Mountain.[12]

In sum, if the BLM's action precluded Nevada from participating in the site characterization process, Nevada might well have standing to argue deprivation of its statutory rights. The

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[12]While the allegations that Miflin and Associates are being unlawfully denied access to Yucca Mountain do implicate a possible violation of Nevada's statutory participation rights codified at 42 U.S.C. §§ 10131, 10136, and 10137, Nevada's second cause of action is not yet ripe. (*See* discussion below.)

BLM's grant of the ROWR to DOE does not, however, prejudice Nevada s right to conduct its own site studies. As such, the BLM cannot be construed as acting to obstruct Nevada's statutory participation rights in the repository siting process.

RIGHT-OF-WAY APPLICATION OF MIFLIN & ASSOCIATES IS NOT RIPE

[5] Nevada's second cause of action seeks an order compelling the BLM to grant a right-of-way permit to Miflin & Associates, the private firm retained by Nevada to conduct analysis of Yucca Mountain as a repository. Miflin's application for a right-of-way across the public lands adjacent to Yucca Mountain is dated September 30, 1987. Miflin subsequently acknowledged by letter dated April 25, 1988, that its application was deficient, as pointed out by the BLM in previous correspondence. The BLM is

currently considering Miflin's corrected application.

There has been no final administrative action on the part of the BLM. The correspondence through which the BLM notified Miflin of the deficiencies in its application, even if classified as interlocutory procedural rulings, is not reviewable. Premature review could lead this Court to unnecessarily entangle itself "in abstract disagreements over administrative policies" or unnecessarily interfere with agency decision-making before the "decision has been formalized and its effects felt in a concrete way by the challenging parties." *Maine v. Herrington*, 790 F.2d 8, 9 (1st Cir. 1986), *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967).

Any order by this Court concerning

the processing of Miflin's application for right-of-way would interfere with, if not preempt, the BLM's decision-making process. *See State of Cal. Dept. of Educ. v. Bennett*, 833 F.2d 827, 833 (9th Cir. 1987). Therefore, the Court finds that Nevada's second cause of action is not ripe for judicial review.

NO VIOLATION OF NEVADA'S CONSTITUTIONAL RIGHTS

[6] Nevada's third and fourth causes of action assert that the BLM's grant of the ROWR to the DOE, in the face of Nevada's stated disapproval, violates the equal footing doctrine, infringes upon the State's sovereignty, and thereby infringes on Nevada's rights reserved under the Tenth Amendment. Nevada fails, however, to state a claim upon which relief can be granted.

The Property Clause provides that "Congress shall have Power to dispose of

and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. The Supreme Court has "repeatedly observed" that "'[t]he power over the public land thus entrusted to Congress i without limitations.'" *Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S.Ct. 2285 2291, 49 L.Ed.2d 34 (1976), *quoting United States v. San Francisco*, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940).

This does not mean, however, that the Property Clause exempts public lands from all state regulation. As the Court in *Kleppe* explained:

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to *enact legislation* respecting those lands pursuant to the Property Clause. *And when Congress so acts,* the federal legislation necessarily overrides conflicting state laws

under the Supremacy Clause. 426 U.S. at 543, 96 S.Ct. at 2293 (citations omitted) (emphasis added).

Inasmuch as the BLM is authorized, indeed required, pursuant to the NWPA, to facilitate the site characterization of Yucca Mountain, it is likewise authorized, in accordance with the FLPMA, to grant a permit to the DOE, a sister federal agency with access for such Congressionally mandated purposes. Consequently, Nevada's approval is not, as a matter of law, necessary.[13]

As a final matter, Nevada asserts that the NWPA Amendments of 1987, which designate Yucca Mountain as the only site to be studied by the DOE, arose out of a

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[13]Nevada's claim that the BLM's decision "seriously diminish[es]" its "equal footing and Tenth Amendment rights" is likewise without merit. (Complaint, #1 ¶ 3.2 at 10-11). The BLM's Motion to Dismiss discusses this adequately (#15 at 59-66), and this Court only emphasizes Nevada's Statehood Act of 1864, in which the then territory of Nevada declared to "forever disclaim all right and title to the unappropriated public lands lying within said territory." 13 Stat. 30 (1864).

political conspiracy between the BLM, th DOE and Congress designed to isolate Nevada and render it the unwilling host of the repository. Consequently, Nevada argues, the BLM's grant of a ROWR to DOE is the fruit of the conspiracy, thereby enabling Nevada to assert a claim for relief based on deprivation of the equal footing doctrine and the Tenth Amendment

Nevertheless, it is well establishe that the Tenth Amendment limits on Congress' authority to regulate state activities are "structural, not substantive--i.e., that States must find their protection from congressional regulation through the national politica process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, ___ U.S. ___, 108 S.Ct. 1355, 1360, 99 L.Ed.2d 592 (1988), *citing Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S.

528, 537-554, 105 S.Ct. 1005, 1010-1019, 83 L.Ed.2d 1016 (1985).

In *South Carolina v. Baker*, the state contended that the political process failed because Congress enacted a provision to the Internal Revenue Code which adversely affected state and local government bonds. In rejecting this argument, the Supreme Court stated:

> Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or define the defects that might lead to such invalidation. Nor do we attempt any definitive articulation here. It suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless . . . . *[N]othing in Garcia or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation.* Where, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated. 108

S.Ct. 1355 at 1360-61 (emphasis added).

[7] In this case, Nevada asserts that it was singled out by a political conspiracy "render[ing] Nevada, a politically weak state, defenseless to the interests of the other 49 states . . . ." (#1, ¶3.2, at 10). Nevada offers as proof of this alleged conspiracy the fact that no member of its congressional delegation was present at certain committee meetings at which the NWPA Amendments of 1987 were promulgated. There is no indication, however, that Nevada lawmakers were inappropriately *denied* the opportunity to contribute input or otherwise participate. Consequently, this court cannot conclude that the promulgation of national legislation affecting one state in a particular manner is sufficient to establish an "extraordinary defect in the national political process," sufficient

to implicate a violation of the Constitution.[14]

CONCLUSION

This court must concur with the BLM's summation of its Motion to Dismiss, which boils down Nevada's Complaint to its essence:

> [n]judicial opinion exists holding that the Congress' power to decide when, where, how and whom may use the public lands is so coterminous with a state's sovereignty that the federal government's needful regulation must, as a matter of constitutional law, depend upon a state's consent. Consequently, Nevada may not abrogate its binding agreement [Statehood Act] forever disclaiming any right to interfere with Congress' needful regulation of the public lands. Neither under the equal footing doctrine with the other states, nor otherwise, does Nevada have any right reserved to it that requires the BLM to obtain the state's consent before allowing the

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[14]Moreover, Nevada's challenge under the Tenth Amendment is directed solely at the NWPA Amendments of 1987, which designate Yucca Mountain as the sole study site. Consequently, this court is without jurisdiction, since Congress vested original and exclusive jurisdiction over such matters arising under the NWPA with the courts of appeal. 42 U.S.C. § 10139(a)(1)(C) (1982); *General Elec. Uranium v. U.S. Dept. of Energy*, 764 F.2d 896, 901-02 (D.C. Cir. 1985).

Department of Energy to occupy and use public lands for a purposes Congress itself mandates. BLM's Motion to Dismiss (#15 at 66).

IT IS THEREFORE ORDERED THAT the State of Nevada's Complaint (#1) is DISMISSED.

BLM ORDER OF JANUARY 6, 1988

Certified Mail

Return Receipt Requested

D E C I S I O N

State of Nevada :

Office of the : Right-of-Way

Attorney General :

Capitol Complex :

Carson City, NV 89710:

OBJECTIONS DISMISSED

RIGHT-OF-WAY GRANTED

By right-of-way reservation pursuant to Section 507 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2781, 43 U.S.C. 1767), the Bureau of Land Management (BLM) has authorized to the

Department of Energy (DOE) the use of public lands in Bullfrog county for site characterization studies. The reservation to DOE was granted on this date. A copy of the reservation document is enclosed.

The State of Nevada is hereby notified of this action because it has objected to the issuance of a right-of-way in lieu of a withdrawal of the lands for the project. The objection is dismissed and the right-of-way has been granted.

The issuance of this right-of-way grant constitutes a final decision by the BLM in this matter. You have the right of appeal to the Board of Land Appeals, Office of the Secretary in accordance with the regulations in 43 CFR Part 4.400. If an appeal is taken the notice of appeal must be filed in the Nevada State Office of BLM (not the Office of the Board) within thirty (30) days of

receipt of the decision appealed from, so that the case file can be transmitted to the Board. The notice may contain a statement of reasons for the appeal but if not, such a statement must be filed with the Board (Address: Board of Land Appeals, Office of the Secretary, Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203) within thirty (30) days after the notice was filed. Additionally, the appellant must serve a copy of the notice of appeal and of any reasons, written arguments, or briefs on the Regional Solicitor, Pacific Southwest Region (Address: U.S. Dept. of the Interior, 2800 Cottage Way, Room E-2753, Sacramento, CA 95825) and each adverse party named in the decision appealed from, in the manner prescribed in Sec. 4.401(c), not later than fifteen (15) days after filing the document. To avoid summary dismissal of the appeal,

there must be strict compliance with the regulations. The appellant has the burden of proof by positive and substantial evidence wherein the decision appealed from is in error.

Edward F. Spang
State Director, Nevada

2 Enclosures
1. Copy of Reservation
2. Appeal Information Form 1842-1

cc: State of Nevada,
Nuclear Waste Project
(w/enclosure) Certified Mail

bcc: Director (321), Room 3643,
MIB (w/enclosure)
DM, Las Vegas (w/enclosure)
DOE, Waste Management
Project Office,
Nevada Operations Office

JMOFFITT;DMR;12/22/87

COMPLAINT

BRIAN McKAY, ATTORNEY GENERAL
STATE OF NEVADA
Harry W. Swainston, Deputy Attorney General
Capitol Complex
1802 N. Carson St., Suite 252
Carson City, NV 89710
(702) 885-5866

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

* * *

THE STATE OF NEVADA Plaintiff, v. ROBERT F. BURFORD, Director, Bureau of Land Management, Department of Interior, EDWARD F. SPANG, Nevada State Director, Bureau of Land Management, Department of Interior, Defendants.	Civ. No._____ COMPLAINT FOR MANDAMUS, INJUNCTIVE AND DECLARATORY RELIEF AND FOR JUDICIAL REVIEW

Plaintiff alleges:

FIRST CAUSE OF ACTION

1.1 The jurisdiction of this Court arises under 28 U.S.C. § 1331, 28 U.S.C. § 1361, 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 702-706, as hereinafter more fully appears.

28 U.S.C. § 1331 provides that the District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1361 provides that the District Courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the Plaintiff.

28 U.S.C. § 2201 provides that in a case of actual controversy within its jurisdiction any Court of the United States, upon the filing of an appropriate

pleading, may declare the rights and other legal relations of any interested party seeking such declaration.

5 U.S.C. § 702 provides that a person suffering legal wrong because of agency action is entitled to judicial review thereof and an action seeking specific relief may not be dismissed nor relief be denied on the ground that it is against the United States or that the United States is an indispensable party. 5 U.S.C. § 706 provides that the reviewing court shall interpret and decide the relevant question of law and compel agency action unlawfully withheld or unreasonably delayed and hold unlawful and set aside agency action under certain listed circumstances of unlawfulness.

1.2 This action arises under federal common law; the equal-footing doctrine; Article I, § 8, cl. 17 of the Constitution; Article IV, § 3 of the

Constitution; the Fifth and Tenth Amendments to the Constitution, the Federal Land Policy And Management Act of 1976 (FLPMA), 43 U.S.C. § 1701, et seq.; the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321, et seq.; the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411-15 (now expired); the Mining Law of 1872, as amended 30 U.S.C. § 21, et seq.; the Minerals Leasing Act of 1920, 30 U.S.C. §§ 49, 50, 181 et seq.; the Mining and Mineral Policy Act of 1970, 30 U.S.C. § 21a; the Geothermal Steam Act, 30 U.S.C. §§ 1001-1025; the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10101, et seq., as amended by the Nuclear Waste Policy Act Amendments Act of 1987, Title V, Pub. L. 100-203; and the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, et seq.

1.3 Plaintiff State of Nevada brings

this action in its sovereign capacity, its proprietary capacity and as parens patriae of its citizens.

1.4 Plaintiff State of Nevada is a sovereign State of the United States. On February 2, 1983, the Governor and Legislature of the State of Nevada were notified pursuant to Section 116(a) of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10136, that a repository for the disposal and storage of high-level radioactive waste and spent nuclear fuel may be located in a tuff medium at Yucca Mountain in southeastern Nevada. On December 21, 1987 the Congress enacted the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203. Title V of the Act contains the Nuclear Waste Policy Amendments Act of 1987 (NWPAA). In the 1987 amendments Congress selected the Yucca Mountain site as the only site to be characterized for

possible development as a repository site. Congress, however, did not withdraw, segregate or set aside the Yucca Mountain site from the public lands. General provisions of law were, therefore, to remain applicable for this purpose.

1.5 The Plaintiff State of Nevada, has oversight and monitoring responsibility for the Department of Energy's program to characterize the site and, if subsequently selected, for the construction of a high-level nuclear waste repository at Yucca Mountain, Nevada. The State's oversight role extends to agency action by the BLM insofar as it affects site characterization.

1.6 Defendant Robert F. Burford is the duly appointed, qualified and acting Director of the Bureau of Land Management, Department of Interior.

Defendant Edward F. Spang is the Nevada State Director of the Bureau of Land Management, Department of Interior. Section 120 of the NWPA, 42 U.S.C. § 10140, requires Defendants Burford and Spang to expedite the issuance of appropriate authorizations for land use in connection with the characterization of Yucca Mountain "to the extent permitted by the applicable provisions of law administered by such agency or officer."

1.7 Officials of the Department of Energy, on or about November 23, 1987, filed an Application For Transportation And Utility Systems And Facilities On Federal Lands (Form 299) with the Nevada Bureau of Land Management Office seeking a right-of-way reservation to perform site characterization studies at the Yucca Mountain site.

1.8 On January 6, 1988, Defendant Edward

F. Spang granted the Department of Energy's application for a right-of-way reservation (ROWR) pursuant to presumed authority in Section 507 of FLPMA despite the Nevada Attorney General's vigorous opposition to an approval of a ROWR and his contention that a withdrawal established pursuant to the substantive and procedural provisions of FLPMA is the only appropriate land use instrument to establish an appropriate land status in advance of site characterization. The Attorney General further contended in written memoranda that the withdrawal must be established with Congressional approval and the Nevada Legislature's consent as required by Article I, § 8, cl. 17. He argued that a withdrawal with these legislative approvals was the only instrument under the circumstances and the law by which Defendants could authorize land use for the proposed site

characterization activities.

1.9 On February 5, 1988, the State of Nevada and its Nuclear Waste Project Office, represented by the Nevada Attorney General, timely filed a Notice of Appeal of Defendant Spang's decision with Spang's office, thereby initiating an appeal before the Department of Interior Board of Land Appeals. The State of Nevada has determined that resort to the Board of Appeals process would be futile because the 18-month to 24-month backlog of cases before the administrative tribunal would render a favorable decision too late to be an effective remedy. Furthermore, the legal question of whether a right-of-way reservation is an appropriate authorizing instrument has been decided by the Bureau adverse to the State's position and it is unlikely that a change in the agency's interpretation of law will be provided by

the Board of Land Appeals. The legal question, in the final analysis, is for the federal courts to make.

1.10 A case or controversy now exists between the State of Nevada and the Defendant officials of the BLM involving their issuance of the ROWR to the Department of Energy.

1.11 A case with overlapping issues is pending in the Ninth Circuit Court of Appeals against the Secretary of Energy styled State of Nevada, et al. v. John Herrington, Secretary of the United States Department of Energy, Case No. 86-7308, alleging his failure to seek a withdrawal and, contemporaneously, the Nevada Legislature's consent as required by the NWPA, the Nuclear Regulatory Commission regulations in 10 C.F.R. § 60.121 and Article I, § 8, cl. 17.

1.12 The primary litigable issue in the present complaint which does not overlap

the issues in Nevada, et al. v. Herrington, supra, involves the validity of an ROWR as the authorizing instrument for DOE site characterization activities. The State contends that the Defendants' approval of the ROWR is not authorized by FLPMA or any other lawful authority including any of the lawfully established administrative regulations which concern the granting of ROWR's in 43 C.F.R. § 2800. Furthermore, the Defendants' approval of the ROWR constitutes either an unlawful defacto reclassification of public land in violation of FLPMA or an unlawful defacto withdrawal of public land, also in violation of FLPMA. Defendant Burford is presently enjoined from altering land use classifications inconsistent with classifications existing on January 1, 1981 without compliance with the procedural and substantive requirements of FLPMA. See

National Wildlife Federation v. Robert R. Burford, U.S.D.C. District of Columbia, Civil Action No. 85-2238, affirmed, 835 F.2d 305 (DC Cir. 1987). Defendant Burford is also prohibited from maintaining defacto withdrawals. See e.g., Mountain State Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980).

1.13 The 51,789 acres included within the BLM managed public land portion of the ROWR are presently classified pursuant to the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411-18, and the regulations in 43 C.F.R. 2410 and 2411, for multiple-use management. See Notice of Classification of Public Lands, Serial Number N-1574 dated February 27, 1970 attached hereto as Exhibit "A." Numerous mining claims have been filed consistent with this classification, some of which are on the top of Yucca Mountain on sites which the Secretary of Energy proposes to

use for site characterization purposes. Other mining claims may also be anticipated. As the lands are within a known geothermal resource area, geothermal exploration and leasing activity may be anticipated. Site characterization activities as planned by the DOE are inconsistent with the current classifications.

1.14 An ROWR is a legally defective instrument for authorizing site characterization. Site characterization is an extensive investigative process involving mining operations and surface and subsurface exploration involving geological, hydrological, geophysical, geochemical, paleoclimatic, and meteorological studies which physically put people and equipment a thousand to two thousand feet below the surface of the geologic formation to evaluate the site to determine its potential

capability for meeting the requirements for a repository. Two exploratory shafts, 12 feet in diameter, whose walls will be encased with concrete two feet thick, 1100 and 1480 feet deep, are part of site characterization. These shafts, connecting drifts and the breakout rooms will become a part of the repository if it is eventually authorized and constructed. Site characterization will extend over a period of several years and will cost in excess of one billion dollars. Section 507 of FLPMA did not authorize a right-of-way permit for the extensive disruption to the surface and subsurface and interference with multiple use necessarily included in the site characterization process.

1.15 The ROWR authorization to the Department of Energy is defective for the additional reason that it does not legally describe all of the lands which

the Department of Energy will need for characterization purposes. Sections 10, 11, 14, 15, 22, 23, 26, 27 and 36 of Township 12S, Range 49E, Mount Diablo Meridian, unsurveyed, were omitted.

1.16 The adoption by Defendants of the Department of Energy's Environmental Assessment (DOE/RW 0073) which was required by the NWPA in connection with the Secretary of Energy's recommendation of the Yucca Mountain site to the President on May 28, 1986 for site characterization is unlawful as it does not satisfy the BLM's NEPA responsibility. The DOE's environmental assessment addresses only items i-vi of Section 112(b)(1)(D) of NWPA, 42 U.S.C. § 10132, and need not and does not otherwise comply with NEPA. The nomination environmental assessment is presently being contested in Nevada, et al. v. Herrington, Case No. 86-7309,

before the Ninth Circuit Court of Appeals. The State contends in that action that the environmental assessment is null and void.

1.17 Section 112(b)(1)(D), 42 U.S.C. § 10132, of the NWPA requires that an environmental assessment evaluate whether the Yucca Mountain site is suitable for development as a repository under each guideline in 10 C.F.R. Part 960 that does not require site characterization as a prerequisite for application of such guideline. The State contends that the guideline in 10 C.F.R. 960.5-2-2 relating to site ownership and control requires a determination in advance of characterization that the DOE can obtain "in accordance with the requirements of 10 C.F.R. 60.121, ownership, surface and subsurface rights, and control of access that are required . . .." The determination that leaves the actual

withdrawal and acquisition of State Legislative consent to a point in time after site characterization arbitrarily jeopardizes the expenditure of billions of dollars of the ratepayers' contributions to the Nuclear Waste Fund created by Section 302(c) of the NWPA. A further pre-site characterization requirement of 10 C.F.R. 60.121 relates to the acquisition of water rights for site characterization. Without a land withdrawal there is no assurance that the water necessary for site characterization may be obtained.

1.18 Plaintiff is entitled to an order in the nature of a Writ of Mandamus to compel Defendant officials to rescind the January 6, 1988 ROWR awarded to the Department of Energy for site characterization purposes.

SECOND CAUSE OF ACTION

2.1 Plaintiff incorporates herein by

reference the allegations of Paragraphs 1.1 through 1.18 of its First Cause of Action.

2.2 While an ROWR is decidedly an improper authorization for the Department of Energy's activities, it is appropriate under FLMPA to authorize the limited activities of a private enterprise. Defendant Spang has arbitrarily and unlawfully refused to grant the State of Nevada's contractor, Mifflin and Associates, access to the Yucca Mountain site for purposes of geologic and hydrologic testing in connection with the State's oversight role. Copies of the application filed by Mifflin and Associates with the BLM is attached hereto as Exhibit "B."

2.3 Plaintiff is entitled to an order in the nature of a Writ of Mandamus to compel Defendant officials to grant the State of Nevada's contractor, Mifflin and

Associates, a right-of-way permit to permit access for site characterization studies as a part of the State's oversight and monitoring function.

THIRD CAUSE OF ACTION

3.1 Plaintiff incorporates herein by reference the allegations of Paragraphs 1.1. through 1.18 of its First Cause of Action and Paragraphs 2.2 and 2.3 of its Second Cause of Action.

3.2 The acts of Defendants raise constitutional issues of the highest order involving the land-holding function of the United States. The Defendants have conspired with the Department of Energy Officials to create a fait accompli in which the State of Nevada's political right to object to its selection as the host for a repository for the nation's spent nuclear fuel rods is rendered meaningless. The object of their conspiracy is to render Nevada, a

politically weak State, defenseless to the interests of the other 49 states in solving a purely commercial problem at the expense of Nevada which has played no part in creating the problem. Unless the Defendants are permanently restrained and enjoined, Nevada's equal footing and Tenth Amendment rights will be seriously diminished to the detriment of Nevada and the Union of States.

FOURTH CAUSE OF ACTION

4.1 Plaintiff incorporates herein by reference the allegations of Paragraphs 1.1 through 1.18 of the First Cause of Action, Paragraphs 2.2 and 2.3 of the Second Cause of Action, and Paragraph 3.2 of the Third Cause of Action.

4.2 Plaintiff desires a judicial determination of her rights and duties and those of Defendants and a declaration as to whether Defendant officials may authorize, maintain and administer an

ROWR in favor of the Department of Energy for site characterization of Yucca Mountain.

4.3 Plaintiff State of Nevada is entitled to a decree which declares that the action of the Defendants is null and void for the reasons that the nature and degree of infringement upon an unconsenting state's sovereignty and equal footing under the circumstances of this case and particularly upon Nevada's sovereignty and equal footing is not authorized by any power exercisable under the Constitution.

PRAYER FOR RELIEF

WHEREFORE, with respect to Plaintiff's First Cause of Action, Plaintiff prays for relief as follows:

1. For an order requiring Defendant officials to rescind the January 6, 1988 ROWR granted to the Department of Energy.

With respect to Plaintiff's Second Cause of Action, Plaintiff prays for relief as follows:

2. For an order directing Defendant officials to grant Mifflin and Associates ROW permit.

With respect to Plaintiff's Third Cause of Action, Plaintiff prays for relief as follows:

3. For an order enjoining Defendant officials from conspiring with Department of Energy officials to permit access and public land usage which entail an unlawful infringement upon Nevada's constitutional and political rights to participate on an equal footing with member states of the Union.

With respect to Plaintiff's Fourth Cause of Action, Plaintiff prays for relief as follows:

4. For a declaration of the rights and duties of the parties with respect to

federal land-holding and land usage relative to the authorization of public land usage for site characterization activities by the Department of Energy based upon the facts and circumstances of this case, for a declaration of the constitutionality of the FLPMA, NWPA, and NWPAA to the extent these statutes are relied upon for the land use authorization and for a declaration that the January 6, 1988 ROWR is null and void.

With respect to all causes of action, Plaintiff prays for relief as follows:

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4.[5] For costs of suit herein; and

5.[6] For such other and further relief as to the Court appears equitable and proper.

Respectfully submitted this 24th day of March, 1988.

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CONSTITUTIONAL PROVISIONS

PROPERTY CLAUSE, Art. IV, § 3, cl. 2.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

FEDERAL ENCLAVE CLAUSE, Art. I, § 8, cl. 17.

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

NATIONAL ENVIRONMENTAL POLICY ACT

Section 102(2)(C), 42 U.S.C. §4332(2)(C)

Cooperation of agencies; reports availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisonmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate

consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and

irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

NUCLEAR WASTE POLICY ACT[15]

FINDINGS AND PURPOSE

SEC. 111, 42 USC 10131. FINDINGS. (a)The Congress finds that--

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

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[15]The Nuclear Waste Policy Act, as Amended, is voluminous. Sections of the Act which are necessary for an understanding of the Petition For Writ Of Certiorari are reproduced in this Appendix. Some sections presented were either amended in 1987 or added to the Nuclear Waste Policy Act at that time. The amended language and new provisions are indicated by underlineation. Language of the 1982 Act which was deleted is represented by interlineations. As presented, the 1982 version of the United States Code is set forth if the amendments are disregarded. The 1982 version as amended by Supplement V, 1987 is set forth by the amendments.

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with

the provisions of this Act;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) PURPOSES. The purposes of this subtitle are--

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-

level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

SITE CHARACTERIZATION

SEC. 113, 42 USC 10133. (a)IN GENERAL.

The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities at the Yucca Mountain site. ~~beginning with the candidate sites that have been approved under section 10132 and are located in various geologic media.~~ The Secretary shall consider fully the comments received under subsection (b)(2) and section 10132(b)(2) and shall, to the maximum extent practicable and in consultation with the Governor of the State of Nevada ~~State involved or the governing body of the affected Indian tribe involved,~~ conduct site characterization activities in a manner that minimizes any significant adverse environmental impacts identified in such comments or in the environmental assessment submitted under subsection (b)(1) of this section.

(b) COMMISSION AND STATES. (1) Before proceeding to sink shafts at the Yucca Mountain site ~~any candidate site~~, the Secretary shall submit for such candidate site to the Commission and to the Governor or legislature of the State of Nevada ~~either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe on whose reservation such candidate site is located, as the case may be~~, for their review and comment-(A) a general plan for site characterization activities to be conducted at such candidate site, which plan shall include--

(i) a description of such candidate site;

(ii) a description of such site characterization activities, including the following: the extent of planned excavations, plans for

any onsite testing with radioactive or nonradioactive material, plans for any investigation activities that may affect the capability of such candidate site to isolate high-level radioactive waste and spent nuclear fuel, and plans to control any adverse, safety-related impacts from such site characterization activities;

(iii) plans for the decontamination and decommissioning of such candidate site, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities if it is determined unsuitable for application for a construction authorization for a repository;

(iv) criteria to be used to determine the suitability of such candidate site for the location of a

repository, developed pursuant to section 10132(a) of this title; and

(v) any other information required by the Commission;

(B) a description of the possible form or packaging for the high-level radioactive waste and spent nuclear fuel to be emplaced in such repository, a description, to the extent practicable, of the relationship between such waste form or packaging and the geologic medium of such site, and a description of the activities being conducted by the Secretary with respect to such possible waste form or packaging or such relationship; and

(C) a conceptual repository design that takes into account likely site-specific requirements.

(2) Before proceeding to sink shafts at the Yucca Mountain site ~~at any candidate site,~~ the Secretary shall (A) make

available to the public the site characterization plan described in paragraph (1); and (B) hold public hearings in the vicinity of such candidate site to inform the residents of the area in which such candidate site is located of such plan, and to receive their comments.

(3) During the conduct of site characterization activities at the Yucca Mountain site ~~a candidate site~~, the Secretary shall report not less than once every 6 months to the Commission and to ~~either~~ the Governor and legislature of the State of Nevada ~~the State in which such candidate site located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be,~~ on the nature and extent of such activities and the information developed from such activities.

(c) RESTRICTIONS. (1) The Secretary may conduct at ~~any candidate site~~ the Yucca Mountain site only such site characterization activities as the Secretary considers necessary to provide the data required for evaluation of the suitability of such ~~candidate~~ site for an application to be submitted to the Commission for a construction authorization for a repository at such ~~candidate~~ site, and for compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) In conducting site characterization activities--

(A) the Secretary may not use any radioactive material at a candidate site unless the Commission concurs that such use is necessary to provide data for the preparation of the required environmental reports and an application for a construction authorization for a

repository at such ~~candidate~~ site; and

(B) if any radioactive material is used at a ~~candidate~~ site--

(i) the Secretary shall use the minimum quantity necessary to determine the suitability of such ~~candidate~~ site for a repository, but in no event more than the curie equivalent of 10 metric tons of spent nuclear fuel; and

(ii) such radioactive material shall be fully retrievable.

~~(3) If site characterization activities are terminated at a candidate site for any reason, the Secretary shall (A) notify the Congress, the Governors and legislatures of all States in which candidate sites are located, and the governing bodies of all affected Indian tribes where candidate sites are located, of such termination and the reasons for such termination; and (B) remove any~~

~~high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such candidate site as promptly as practicable.~~

~~(4) If a site is determined to be unsuitable for application for a construction authorization for a repository, the Secretary shall take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities.~~

(3) If the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall--

(A) terminate all site characterization activities at such site;

(B) notify the Congress, the Governor and legislature of Nevada of such termination and the reasons for such termination;

(C) remove any high-level radioactive

waste, spent nuclear fuel, or other radioactive materials at or in such site as promptly as practicable;

(D) take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities at such site;

(E) suspend all future benefits payments under subtitle F with respect to such site; and

(F) report to Congress not later than 6 months after such determination the Secretary's recommendations for further action to assure the safe, permanent disposal of spent nuclear fuel and high-level radioactive waste, including the need for new legislative authority.

(d) PRELIMINARY ACTIVITIES. Each activity of the Secretary under this section that is in compliance with the provisions of subsection (c) shall be

considered a preliminary decisionmaking activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

SITE APPROVAL AND CONSTRUCTION AUTHORIZATION

SEC. 114, 42 USC 10134. (a)HEARINGS AND PRESIDENTIAL RECOMMENDATION. (1) The Secretary shall hold public hearings in the vicinity of the Yucca Mountain site ~~each site under consideration for recommendation to the President under this paragraph as a site for the development of a repository~~, for the purposes of informing the residents of the area ~~in which such site is located~~ of such consideration and receiving their

comments regarding the possible recommendation of such site. If, of upon completion of such hearings and completion of site characterization activities at the Yucca Mountain site ~~not less than 3 candidate sites for the first proposed repository, or from all of the characterized sites for the development of subsequent repositories~~, under section 10133 of this title, the Secretary decides to recommend approval of such site to the President, the Secretary shall notify the Governor and legislature of the State of Nevada ~~in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be~~, of such decision. No sooner than the expiration of the 30-day period following such notification, the Secretary shall submit to the President a recommendation that the President approve such site for the

development of a repository. Any such recommendation by the Secretary shall be based on the record of information developed by the Secretary under section 10133 of this title and this section, including the information described in subparagraph (A) through subparagraph (G). ~~In making site recommendations and approvals subsequent to the first site recommendation, the Secretary and the President, respectively, shall also consider the need for regional distribution of repositories and the need to minimize, to the extent practicable, the impacts and cost of transporting spent fuel and solidified high-level radioactive waste~~. Together with any recommendation of a site under this paragraph, the Secretary shall make available to the public, and submit to the President, a comprehensive statement of the basis of such recommendation,

including the following:

(A) a description of the proposed repository, including preliminary engineering specifications for the facility;

(B) a description of the waste form or packaging proposed for use at such repository, and an explanation of the relationship between such waste form or packaging and the geologic medium of such site;

(C) a discussion of data, obtained in site characterization activities, relating to the safety of such site;

(D) a final environmental impact statement prepared pursuant to subsection (f) and the National Environment Policy Act of 1969 (42 U.S.C. 4321 et seq.), <u>together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the</u>

Administrator, and the Commission, except that the Secretary shall not be required in any such environmental impact statement to consider the need for a repository, the alternatives to geological disposal, or alternative sites to the Yucca Mountain site; ~~and including an analysis of the consideration given by the Secretary to not less than 3 candidate sites for the first proposed repository or to all of the characterized sites for the development of subsequent repositories, with respect to which site characterization is completed under section 10133 of this title, together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that any such environmental impact statement concerning the first repository to be developed~~

~~under this Act shall not be required to consider the need for a repository or the alternatives to geologic disposal;~~

(E) preliminary comments of the Commission concerning the extent to which the at-depth site characterization analysis and the waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository;

(F) the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views;

(G) such other information as the Secretary considers appropriate; and

(H) any impact report submitted under section 10136(c)(2)(B) of this title by the State of Nevada. ~~the State in which~~

~~such site is located, or under section 10138(b)(3)(B) of this title by the affected Indian tribe where such site is located, as the case may be.~~

(2)(A) If, after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository, the President shall submit a recommendation of such site to Congress.

~~(2)(A) Not later than March 31, 1987, the President shall submit to the Congress a recommendation of one site form the three sites initially characterized that the President considers qualified for application for a construction authorization for a repository. Not later than March 31, 1990, the President shall submit to the Congress a recommendation of a second site from any sites already characterized that the~~

~~President considers qualified for a construction authorization for a second repository. The President shall submit with such recommendation a copy of the report for such site prepared by the Secretary under paragraph (1). After submission of the second such recommendation, the President may submit to the Congress recommendations for other sites, in accordance with the provisions of this part.~~

(B) The President shall submit with such recommendation a copy of the statement for such site prepared by the Secretary under paragraph (1).

~~(B) The President may extend the deadlines described in subparagraph (A) by not more than 12 months if, before March 31, 1986, for the first site, and March 31, 1989, for the second site, (i) the President determines that such extension is necessary; and (ii)~~

~~transmits to the Congress a report setting forth the reasons for such extension.~~

~~(3) If approval of any such site recommendation does not take effect as a result of a disapproval by the Governor or legislature of a State under section 10136 of this title or the governing body of an affected Indian tribe under section 10138 of this title, the President shall submit to the Congress, not later than 1 year after the disapproval of such recommendation, a recommendation of another site for the first or subsequent repository.~~

(3)(A) ~~(4)(A)~~ The President may not recommend the approval of the Yucca Mountain site ~~any site under this subsection~~ unless the Secretary has recommended to the President under paragraph (1) approval of such site and has submitted to the President a

statement ~~report~~ for such site as required under such paragraph.

(B) No recommendation of a site by the President under this subsection shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(b) SUBMISSION OF APPLICATION. If the President recommends to the Congress the Yucca Mountain site ~~a site for a repository~~ under subsection (a) of this section and the site designation is permitted to take effect under section 10135 of this title, the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the

recommendation of the site designation is effective under such section and shall provide to the Governor and legislature of the State of Nevada ~~in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be,~~ a copy of such application.

(c) STATUS REPORT ON APPLICATION. Not later than 1 year after the date on which an application for a construction authorization is submitted under subsection (b), and annually thereafter until the date on which such authorization is granted, the Commission shall submit a report to the Congress describing the proceedings undertaken through the date of such report with regard to such application, including a description of--

(1) any major unresolved safety issues, and the explanation of the Secretary with

respect to design and operation plans for resolving such issues;

(2) any matters of contention regarding such application; and

(3) any Commission actions regarding the granting or denial of such authorization.

(d) COMMISSION ACTION. The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later ~~than~~ the expiration--

~~(1) January 1, 1989, for the first such application, and January 1, 1992, for the second such application; or~~

~~(2) the expiration~~ of 3 years after the date of the submission of such application, except that the Commission

may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection e(2) (e)(2), of this section. ~~whichever occurs later.~~ The Commission decision approving the first such application shall prohibit the emplacement in the first repository of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of such a quantity of spent fuel until such time as a second repository is in operation. In the event that a monitored retrievable storage facility, approved pursuant to subtitle C of this Act, shall be located, or is planned to be located, within 50 miles of the first repository, then the Commission decision approving the first such

application shall prohibit the emplacement of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of spent fuel in both the repository and monitored retrievable storage facility until such time as a second repository is in operation.

(e) PROJECT DECISION SCHEDULE. (1) The Secretary shall prepare and update, as appropriate, in cooperation with all affected Federal agencies, a project decision schedule that portrays the optimum way to attain the operation of the repository ~~involved,~~ within the time period specified in this subtitle. Such schedule shall include a description of objectives and a sequence of deadlines for all Federal agencies required to taken action, including an identification

of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning repository operation.

(2) Any Federal agency that determines that it cannot comply with any deadline in the project decision schedule, or fails to so comply, shall submit to the Secretary and to the Congress a written report explaining the reason for its failure or expected failure to meet such deadline, the reason why such agency could not reach an agreement with the Secretary, the estimated time for completion of the activity or activities involved, the associated effect on its other deadlines in the project decision schedule, and any recommendations it may have or actions it intends to take regarding any improvements in its operation or organization, or changes to its statutory directives or authority, so

that it will be able to mitigate the delay involved. The Secretary, within 30 days after receiving any such report, shall file with the Congress his response to such report, including the reasons why the Secretary could not amend the project decision schedule to accommodate the Federal agency involved.

(f) ENVIRONMENTAL IMPACT STATEMENT. Any recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). A final environmental impact statement prepared by the Secretary under such Act shall accompany any recommendation to the President to approve a site for a repository.

(2) With respect to the requirements

imposed by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), compliance with the procedures and requirements of this Act shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository.

(3) For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 1321 et seq.) and this section, the Secretary need not ~~shall~~ consider ~~as~~ alternate sites to the Yucca Mountain site for the first repository to be developed under this subtitle. ~~3 candidate site with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination,~~

~~that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 10132(a) of this title. The Secretary shall consider as alternative sites for subsequent repositories at least three of the remaining sites recommended by the Secretary by January 1, 1985, and by July 1, 1989, pursuant to section 10132(b) of this title and approved by the President for site characterization pursuant to section 10132(c) of this title for which (1) site characterization has been completed under section 10133 of this title; and (2) the Secretary has made a preliminary determination that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 10132(a) of this title.~~

(4) Any environmental impact statement

prepared in connection with a repository proposed to be constructed by the Secretary under this part shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(5) Nothing in this Chapter shall be construed to amend or otherwise detract

from the licensing requirements of the Nuclear Regulatory Commission as established in title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 et seq.).

(6) In any such statement prepared with respect to the ~~first~~ repository to be constructed under this part, ~~the need for a repository or nongeologic alternatives to the site of such repository shall not be considered.~~ the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or nongeologic alternatives to such site.

REVIEW OF REPOSITORY SITE SELECTION

SEC. 115, 42 U.S.C. 10135. (a)"Resolution of repository siting approval" defined. For purposes of this section, the term "resolution of repository siting approval" means a joint resolution of the

Congress, the matter after the resolving clause of which is as follows: "That there hereby is approved the site at . . . for a repository, with respect to which a notice of disapproval was submitted by . . . on . . . ." The first blank space in such resolution shall be filled with the name of the geographic location of the proposed site of the repository to which such resolution pertains; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or Indian tribe governing body submitting the notice of disapproval to which such resolution pertains; and the last blank space in such resolution shall be filled with the date of such submission.

(b) STATE OR INDIAN TRIBE PETITIONS. The designation of a site as suitable for application for a construction

authorization for a repository shall be effective at the end of the 60-day period beginning on the date that the President recommends such site to the Congress under section 10134 of this title, unless the Governor and legislature of the State in which such site is located, or the governing body of an Indian tribe on whose reservation such site is located, as the case may be, has submitted to the Congress a notice of disapproval under section 10136 or 10138 of this title. If any such notice of disapproval has been submitted, the designation of such site shall not be effective except as provided under subsection (c) of this section.

(c) CONGRESSIONAL REVIEWS OF PETITIONS. If any notice of disapproval of a repository site designation has been submitted to the Congress under section 10136 or 10138 of this title after a recommendation for approval of such site

is made by the President under section 10134 of this title, such site shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress after the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution of repository siting approval in accordance with this subsection approving such site, and such resolution thereafter becomes law.

(d) PROCEDURES APPLICABLE TO THE SENATE.

(1) The provisions of this subsection are enacted by the Congress--

(A) as an exercise of the rulemaking power of the Senate, and as such they are deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions of repository siting approval, and such provisions supersede other rules of the Senate only

to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the Senate to change the rules (so far as relating to the procedure of the Senate) at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

(2)(A) Not later than the first day session following the day on which any notice of disapproval of a repository site selection is submitted to the Congress under section 10136 or 10138 of this title, a resolution of repository siting approval shall be introduced (by request) in the Senate by the chairman of the committee to which such notice of disapproval is referred, or by a Member or Members of the Senate designated by such chairman.

(B) Upon introduction, a resolution of

repository siting approval shall be referred to the appropriate committee or committees of the Senate, by the President of the Senate, and all such resolutions with respect to the same repository site shall be referred to the same committee or committees. Upon the expiration of 60 calendar days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall make its recommendations to the Senate.

(3) If any committee to which is referred a resolution of siting approval introduced under paragraph (2)(A), or, in the absence of such a resolution, any other resolution of siting approval introduced with respect to the site involved, has not reported such resolution at the end of 60 days of

continuous session of Congress after introduction of such resolution, such committee shall be deemed to be discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the Senate.

(4)(A) When each committee to which a resolution of siting approval has been referred has reported, or has been deemed to be discharged from further consideration of, a resolution described in paragraph (3), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) for any Member of the Senate to move to proceed to the consideration of such resolution. Such motion shall be highly privileged and shall not be debatable. Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to

proceed to the consideration of other business. A motion to reconsider the vote by which such motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of such resolution is agreed to, such resolution shall remain the unfinished business of the Senate until disposed of. (B) Debate on a resolution of siting approval, and on all debatable motions and appeals in connection with such resolution, shall be limited to not more than 10 hours, which shall be divided equally between Members favoring and Members opposing such resolution. A motion further to limit debate shall be in order and shall not be debatable. Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to proceed to the consideration of other business, and a motion to recommit such resolution shall not be in

order. A motion to reconsider the vote by which such resolution is agreed to or disagreed to shall not be in order.

(C) Immediately following the conclusion of the debate on a resolution of siting approval, and a single quorum call at the conclusion of such debate if requested in accordance with the rules of the Senate, the vote on final approval of such resolution shall occur.

(D) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a resolution of siting approval shall be decided without debate.

(5) If the Senate receives from the House a resolution of repository siting approval with respect to any site, then the following procedure shall apply:

(A) The resolution of the House with respect to such site shall not be referred to a committee.

(B) With respect to the resolution of the Senate with respect to such site--

(i) the procedure with respect to that or other resolutions of the Senate with respect to such site shall be the same as if no resolution from the House with respect to such site had been received; but

(ii) on any vote on final passage of a resolution of the Senate with respect to such site, a resolution from the House with respect to such site where the text is identical shall be automatically substituted for the resolution of the Senate.

(e) PROCEDURES APPLICABLE TO THE HOUSE OF REPRESENTATIVES.

(1) The provisions of this section are enacted by the Congress--

(A) as an exercise of the rulemaking power of the House of Representatives, and as such they are deemed a part of the

rules of the House, but applicable only with respect to the procedure to be followed in the House in the case of resolutions of repository siting approval, and such provisions supersede other rules of the House only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the House to change the rules (so far as relating to the procedure of the House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(2) Resolutions of repository siting approval shall upon introduction, be immediately referred by the Speaker of the House to the appropriate committee or committees of the House. Any such resolution received from the Senate shall be held at the Speaker's table.

(3) Upon the expiration of 60 days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall be discharged from further consideration of such resolution, and such resolution shall be referred to the appropriate calendar, unless such resolution or an identical resolution was previously reported by each committee to which it was referred.

(4) It shall be in order for the Speaker to recognize a Member favoring a resolution to call up a resolution of repository siting approval after it has been on the appropriate calendar for 5 legislative days. When any such resolution is called up, the House shall proceed to its immediate consideration and the Speaker shall recognize the Member calling up such resolution and a

Member opposed to such resolution for 2 hours of debate in the House, to be equally divided and controlled by such Members. When such time has expired, the previous question shall be considered as ordered on the resolution to adoption without intervening motion. No amendment to any such resolution shall be in order, nor shall it be in order to move to reconsider the vote by which such resolution is agreed to or disagreed to.

(5) If the House receives from the Senate a resolution of repository siting approval with respect to any site, then the following procedure shall apply:

(A) The resolution of the Senate with respect to such site shall not be referred to a committee.

(B) With respect to the resolution of the House with respect to such site--

(i) the procedure with respect to that or other resolutions of the House with

respect to such site shall be the same as if no resolution from the Senate with respect to such site had been received; but

(ii) on any vote on final passage of resolution of the House with respect to such site, a resolution from the Senate with respect to such site where the text is identical shall be automatically substituted for the resolution of the House.

(f) COMPUTATION OF DAYS. For purposes of this section--

(1) continuity of session of Congress is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 90-day period referred to in subsection (c) of this section and the 60-day period

referred to in subsections (d) and (e) of this section.

(g) INFORMATION PROVIDED TO CONGRESS. In considering any notice of disapproval submitted to the Congress under section 10136 or 10138 of this title, the Congress may obtain any comments of the Commission with respect to such notice of disapproval. The provision of such comments by the Commission shall not be construed as binding the Commission with respect to any licensing or authorization action concerning the repository involved.

PARTICIPATION OF STATES

SEC. 116, 42 U.S.C. 10136.

(a)NOTIFICATION OF STATES AND AFFECTED TRIBES. The Secretary shall identify the States with one or more potentially acceptable sites for a repository within 90 days after January 7, 1983. Within 90 days of such identification, the

Secretary shall notify the Governor, the State legislature, and the tribal council of any affected Indian tribe in any State of the potentially acceptable sites within such State. For the purposes of this subchapter, the term "potentially acceptable site" means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

(b) STATE PARTICIPATION IN REPOSITORY SITING DECISIONS. (1) Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under paragraph (2). In any case in which State law provides for submission of any such notice of disapproval by any other

person or entity, any reference in this subtitle to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

(2) Upon the submission by the President to the Congress of a recommendation of a site for a repository, the Governor or legislature of the State in which such site is located may disapprove the site designation and submit to the Congress a notice of disapproval. Such Governor or legislature may submit such notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under section 10134 of this title. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President

pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why such Governor or legislature disapproved the recommended repository site involved.

(3) The authority of the Governor or legislature of each State under this subsection shall not be applicable with respect to any site located on a reservation.

(c) FINANCIAL ASSISTANCE. (1)(A) The Secretary shall make grants to the State of Nevada and any affected unit of local government ~~each State notified under subsection (a) of this section~~ for the purpose of participating in activities required by this section and section 10137 of this title or authorized by written agreement entered into pursuant to subsection 10137(c) of this title. Any salary or travel expense that would ordinarily be incurred by such State, or

by any political subdivision of such State, may not be considered eligible for funding under this paragraph.

(B) The Secretary shall make grants to the State of Nevada and any affected unit of local government ~~each State in which a candidate site for a repository is approved under section 10132(c) of this title. Such grants may be made to each such State only~~ for purposes of enabling such State or affected unit of local government--

(i) to review activities taken under this subtitle with respect to the Yucca Mountain ~~such~~ site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of such repository on such ~~the~~ State or affected unit of local government and its residents;

(ii) to develop a request for impact

assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to its residents regarding any activities of such State, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this subtitle with respect to such site.

(C) Any salary or travel expense that would ordinarily be incurred by the State of Nevada or any affected unit of local government ~~such State, or by any political subdivision of such State,~~ may not be considered eligible for funding

under this paragraph.

2)(A)(i) The Secretary shall provide financial and technical assistance to the State of Nevada, and any affected unit of local government ~~any State~~ requesting such assistance ~~in which there is a site with respect to which the Commission has authorized construction of a repository~~.

(ii) Such assistance shall be designed to mitigate the impact on such State or affected unit of local government of the development of such repository and the characterization of such site.

(iii) Such assistance to such State or affected unit of local government shall commence ~~within 6 months following the granting by the Commission of a construction authorization for such repository and following~~ upon the initiation of site characterization ~~construction~~

activities ~~at such site~~.

(B) The State of Nevada and any affected unit of local government may request assistance under this subsection by preparing and submitting to the Secretary a report on the economic, social, public health and safety, and environmental impacts that are likely to result from site characterization activities at the Yucca Mountain site. Such report shall be submitted to the Secretary after the Secretary has submitted to the State a general plan for site characterization activities under section 10133(b) of this title. ~~Any State desiring assistance under this paragraph shall prepare and submit to the Secretary a report on any economic, social, public health and safety, and environmental impacts that are likely as a result of the development of a repository at a site in such State. Such report shall be submitted to the~~

~~Secretary following the completion of site characterization activities at such site and before the recommendation of such site to the President by the Secretary for application for a construction authorization for a repository. As soon as practicable following the granting of a construction authorization for such repository, the Secretary shall seek to enter into a binding agreement with the State involved setting forth the amount of assistance to be provided to such State under this paragraph and the procedures to be followed in providing such assistance~~.

(C) As soon as practicable after the Secretary has submitted such site characterization plan, the Secretary shall seek to enter into a binding agreement with the State of Nevada setting forth--

(i) the amount of assistance to be

provided under this subsection to such State or affected unit of local government; and

(ii) the procedures to be followed in providing such assistance.

(3)(A) In addition to financial assistance provided under paragraphs (1) and (2), the Secretary shall ~~also~~ grant to ~~each State and~~ the State of Nevada and any affected unit of ~~general~~ local government ~~in which a site for a repository is approved under section 10132(c) of this title~~ an amount each fiscal year equal to the amount such State or affected unit of local government, respectively, would receive ~~were they~~ if authorized to tax site characterization activities at such site, and the development and operation of such repository, as such State ~~and~~ or affected unit of local government ~~tax~~ taxes the ~~other~~ non-Federal real property and

industrial activities occurring within such State ~~and~~ or affected unit of ~~general~~ local government. (B) Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(4)(A) ~~A State~~ The State of Nevada or any affected unit of local government may not receive any grant under paragraph (1) after the expiration of the 1-year period following--

(i) the date on which the Secretary notifies the Governor and legislature of the State of Nevada of the termination of site characterization activities at the ~~candidate~~ site ~~involved~~ in such State;

(ii) the date on which the Yucca Mountain site ~~in such State~~ is disapproved under section 10135 of this title; or

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;

whichever occurs first. ~~unless there is another candidate site in the State approved under section 10132(c) of this title with respect to which the actions described in clauses (i), (ii), and (iii) have not been taken~~.

(B) ~~A State~~ The State of Nevada or any affected unit of local government may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities or site characterization activities at such site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any

license to receive and possess for a repository in a State, no Federal funds, shall be made available to such State or affected unit of local government under paragraph (1) or (2), except for--

(i) such funds as may be necessary to support ~~State~~ activities related to any other repository located in, or proposed to be located in, such State, and for which a license to receive and possess has not been in effect for more than 1 year;

(ii) such funds as may be necessary to support State activities pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such State with the Secretary during such 2-year period; and

(iii) such funds as may be provided under an agreement entered into under title IV of this chapter.

(5) Financial assistance authorized in this subsection shall be made out of amounts held in the Nuclear Waste Fund ~~established in section 10222 of this title~~.

(6) No State, other than the State of Nevada, may receive financial assistance under this subsection after the date of the enactment of the Nuclear Waste Policy Amendments Act of 1987.

(d) ADDITIONAL NOTIFICATION AND CONSULTATION. Whenever the Secretary is required under any provision of this Chapter to notify or consult with the governing body of an affected Indian tribe where a site is located, the Secretary shall also notify or consult with, as the case may be, the Governor of the State in which such reservation is located.

JUDICIAL REVIEW OF AGENCY ACTIONS

SEC. 119, 42 U.S.C. 10139.

(a)JURISDICTION OF UNITED STATES COURTS OF APPEALS. (1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action--

(A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;

(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;

(C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;

(D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this part, or as required under section 10135(c)(1) of

this title, or alleging a failure to prepare such statement with respect to any such action;

(E) for review of any environmental assessment prepared under section 10132(b)(1) or 10135(c)(2) of this title; or

(F) for review of any research and development activity under subchapter II of this chapter.

(2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.

(c) DEADLINE FOR COMMENCING ACTION. A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as

the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

SUBTITLE E--REDIRECTION OF THE NUCLEAR WASTE PROGRAM

SELECTION OF YUCCA MOUNTAIN SITE

SEC. 160, 42 U.S.C 10172 (a) IN GENERAL. (1) The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.

(2) The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate

sites, other than the Yucca Mountain site, within 90 days after December 22, 1987.

(b) Effective on December 22, 1987, the State of Nevada shall be eligible to enter into a benefits agreement with the Secretary under section 10173 of this title.

ENVIRONMENTAL IMPACT STATEMENT

SEC. 407. 42 U.S.C. 10247 (a) IN GENERAL. Issuance of a construction authorization for a repository or monitored retrievable storage facility under section 10245(b) of this title shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(b) PREPARATION. A final environmental impact statement shall be prepared by the Secretary under such Act and shall

accompany any application to the Nuclear Regulatory Commission for a construction authorization.

(c) ADOPTION. (1) Any such environmental impact statement shall, to the extent practicable, be adopted by the Nuclear Regulatory Commission, in accordance with section 1506.3 of title 40, Code of Federal Regulations, in connection with the issuance by the Nuclear Regulatory Commission of a construction authorization and license for such repository or monitored retrievable storage facility.

(2)(A) In any such statement prepared with respect to a repository to be constructed under this title at the Yucca Mountain site, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or

nongeologic alternatives to such site.

(B) In any such statement prepared with respect to a repository to be constructed under this title at a site other than the Yucca Mountain site, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, or nongeologic alternatives to such site but shall consider the Yucca Mountain site as an alternate to such site in the preparation of such statement.

FEDERAL LAND POLICY & MANAGEMENT ACT

SECTION 204, 43 U.S.C. §1714(a)(b)(c)(d)

Withdrawals of lands:

(a) Authorization and limitation; delegation of authority

On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions

and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

(b) Application and procedures applicable subsequent to submission of application

(1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified

in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice.

(2) The publication provisions of this subsection are not applicable to withdrawals under subsection (e) hereof.

(c) Congressional approval procedures applicable to withdrawals aggregating five thousand acres or more

(1) On and after October 21, 1976, a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency

head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and the withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other

resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time

thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(2) With the notices required by subsection (c)(1) of this section and within three months after filing the notice under subsection (e) of this section, the Secretary shall furnish to the committees--

(1) a clear explanation of the proposed use of the land involved which led to the withdrawal;

(2) an inventory and evaluation of the current natural resource uses and values of the site and adjacent public

and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the Nation;

(3) an identification of present users of the land involved, and how they will be affected by the proposed use;

(4) an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination;

(5) an analysis of the manner in which such lands will be used in relation to the specific requirements for the

proposed use;

(6) a statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;

(7) a statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and local government bodies, and with other appropriate individuals and groups;

(8) a statement indicating the effect of the proposed uses, if any, on State and local government interests and the regional economy;

(9) a statement of the expected length of time needed for the withdrawal;

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on

the withdrawal can be examined by interested parties; and

(12) a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.

(d) Withdrawals aggregating less than five thousand acres; procedure applicable

A withdrawal aggregating less than five thousand acres may be made under this subsection by the Secretary on his own motion or upon request by a department or an agency head--

(1) for such period of time as he deems desirable for a resource use; or

(2) for a period of not more than twenty years for any other use, including but not limited to use for administrative sites, location of facilities, and other proprietary purposes; or

(3) for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress.

SECTION 507, 43 U.S.C. § 1767

Rights-of-way for Federal departments and agencies

(a) The Secretary concerned may provide under applicable provisions of this subchapter for the use of any department or agency of the United States a right-of-way over, upon, under or through the land administered by him, subject to such terms and conditions as he may impose.

(b) Where a right-of-way has been reserved for the use of any department or

agency of the United States, the Secretary shall take no action to terminate, or otherwise limit, that use without the consent of the head of such department or agency.

FEDERAL REGULATIONS

10 C.F.R. 60.2 DEFINITIONS

"High-level radioactive waste" or "HLW" means: (1) Irradiated reactor fuel, (2) liquid wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuel, and (3) solids into which such liquid wastes have been converted.

10 C.F.R. 60.121

LAND OWNERSHIP AND CONTROL

Requirements for ownership and control of

interests in land.

(a) *Ownership of land.* (1) Both the geologic repository operations area and the controlled area shall be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use.

(2) These lands shall be held free and clear of all encumbrances, if significant, such as: (i) Rights arising under the general mining laws; (ii) easements for right-of-way; and (iii) all other rights arising under lease, rights of entry, deed, patent, mortgage, appropriation, prescription, or otherwise.

(b) *Additional controls.* Appropriate controls shall be established outside of the controlled area. DOE shall exercise any jurisdiction and control over surface and subsurface estates necessary to

prevent adverse human actions that could significantly reduce the geologic repository's ability to achieve isolation. The rights of DOE may take the form of appropriate possessory interests, servitudes, or withdrawals from location or patent under the general mining laws.

(c) *Water rights.* (1) DOE shall also have obtained such water rights as may be needed to accomplish the purpose of the geologic repository operations area.

(2) Water rights are included in the additional controls to be established under paragraph (b) of this section.

NEVADA STATUTES AND RESOLUTIONS

NEVADA REVISED STATUTE

NRS 328.065:

Application to state for cession of jurisdiction, appropriation of water or consent to use public land or close

public road. An officer of any agency or instrumentality of the United States:

1. May apply to the director of the legislative counsel bureau pursuant to NRS 328.065 to 328.135, inclusive, to obtain a cession of concurrent criminal jurisdiction or other jurisdiction from the State of Nevada.

2. Shall apply to the state engineer pursuant to Title 48 of NRS to appropriate water on the public lands or other federal lands of this state. The state engineer has continuing jurisdiction over any acquisition by the United States of the waters of the State of Nevada, whether by purchase, gift, condemnation, appropriation pursuant to the state's water laws or otherwise, and whether appurtenant to lands acquired by or retained by the United States.

3. Shall apply to the department of transportation pursuant to the procedure

set forth in NRS 408.537, 408.543 and 408.547 for consent to close a public road, as defined in NRS 406.191, which is located on the public lands of this state.

4. Shall apply to the state land use planning agency pursuant to the procedure set forth in NRS 321.736 to 321.739, inclusive, for consent to use land held solely for proprietary purposes relating to the retention and management of the public lands, if that use interferes with the sovereignty of this state respecting the land within its borders.

NRS 328.500(2):

Attorney general may bring, maintain or intervene in actions concerning public lands to protect sovereignty of state.

1. The legislature finds that more than 87 percent of the land in the State of Nevada is held by the Federal

Government, of which 69 percent is public land, and the actions of federal agencies and instrumentalities involving the public lands and waters appurtenant to and public roads over those lands significantly affect the health, safety, welfare and happiness of the citizens of this state and may interfere with the traditional sovereign functions of the State of Nevada with respect to those lands, waters and roads and their uses.

2. Except as provided in subsection 3, the attorney general may:

(a) On his own initiative or at the request of the governor or any state agency, bring and maintain any action; or

(b) Intervene on behalf of or bring and maintain an action on the relation of, any person in any meritorious case, in any court or before any federal agency if any action or proposed action by a

federal agency or instrumentality with respect to the public lands or waters appurtenant to or public roads over those lands impairs or tends to impair the sovereignty of the State of Nevada.

NRS 459.910:

Unlawful to store high-level radioactive waste in state.

1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.

2. As used in this section, unless the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

RESOLUTIONS

ASSEMBLY JOINT RESOLUTION NO. 4.

WHEREAS, Because of the extremely dangerous nature of high-level nuclear waste and the persistence of that danger

for an extended period, the location of such waste in a repository in this state poses a serious hazard to the health and welfare of Nevadans; and

WHEREAS, The residents of the State of Nevada are overwhelmingly opposed to permitting Nevada to become the dumping ground for nuclear waste generated in other states and foreign countries; now, therefore be it

RESOLVED BY THE ASSEMBLY AND SENATE OF THE STATE OF NEVADA, JOINTLY, That the Nevada Legislature expresses its adamant opposition to the placement of a high-level nuclear waste repository in the State of Nevada; and be it further

RESOLVED, That a copy of this resolution be transmitted forthwith by the Chief Clerk of the Assembly to the President of the United States, the Vice President of the United States as the presiding officer of the Senate, the Speaker of the

House of Representatives and to each member of the Nevada Congressional Delegation; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval.

ASSEMBLY JOINT RESOLUTION NO. 6.

WHEREAS, On December 22, 1987, Congress enacted the Nuclear Waste Policy Amendments Act of 1987, specifying Yucca Mountain, Nevada, as the sole location for evaluation as a suitable site for the placement of a national repository for high-level radioactive waste; and

WHEREAS, The Nuclear Waste Policy Amendments Act of 1987 represents just one of the many instances of federal overreaching with regard to the public land in this state; and

WHEREAS, The Federal Government claims ownership of approximately 87 percent of the total land in the State of Nevada,

and has targeted that land for certain undesirable federal programs; and

WHEREAS, The placement of a repository for high-level radioactive waste in the State of Nevada poses serious concerns about the transportation and storage of such waste and the potential harm to the environment and health of the residents and guests of this state; and

WHEREAS, The Nevada economy is dependent upon tourism and the perception of a safe environment; and

WHEREAS, The United States has a duty to protect the economy, environment and public health of this state, which the Nevada Legislature is empowered to protect and preserve; and

WHEREAS, The Federal Government has refused to assume full liability for any deleterious effects that could result from the placement of a repository for high-level radioactive waste in Nevada;

and

WHEREAS, Various polls of the people of this state, including our children in school, demonstrate an over whelming opposition to the location of a repository for high-level radioactive waste at Yucca Mountain; now, therefore, be it

RESOLVED BY THE ASSEMBLY AND SENATE OF THE STATE OF NEVADA, JOINTLY, That the Federal Government, its agencies and instrumentalities shall not establish a repository for high-level radioactive waste at Yucca Mountain, Nevada, without the prior consent of the Nevada Legislature or a cession of jurisdiction pursuant to chapter 328 of the Nevada Revised Statutes, which consent and cession are hereby refused; and be it further

RESOLVED, That copies of this resolution be prepared and transmitted forthwith by

the Chief Clerk of the Assembly to the President of the United States, the Vice President of the United States as the presiding officer of the Senate, the Speaker of the House of Representatives and to each member of the Nevada Congressional Delegation; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval.

(3)

No. 90-1324

Supreme Court, U.S.
FILED
APR 26 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEVADA, ET AL., PETITIONERS

v.

CY JAMISON, DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the State of Nevada's complaint sufficiently alleged its standing to challenge the grant of a right-of-way by the Bureau of Land Management to the Department of Energy pursuant to Section 507 of the Federal Land Policy and Management Act, 43 U.S.C. 1767.

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OCTOBER TERM, 1990

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-10, is reported at 918 F.2d 854. The opinion of the district court, Pet. App. 11-53, is reported at 708 F. Supp. 289.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1990. The petition for a writ of certiorari was filed on February 11, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

On March 24, 1988, the State of Nevada filed this action against officers of the Bureau of Land Management challenging the grant of a right-of-way pursuant to the Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.* This authorization to use public lands of the United States in Nevada was given to the Department of Energy so that it could carry out its duty under the Nuclear Waste Policy Act of 1982 to conduct site characterization activities at Yucca Mountain. See 42 U.S.C. 10101 *et seq.* The purpose of this program is to assess the suitability of the site as a repository for high-level nuclear waste. The district court dismissed the action for failure to allege standing, and the court of appeals affirmed.

1. Under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 *et seq.*, the Bureau of Land Management (BLM), enjoys broad authority to manage the public lands. The generally applicable principle is that the land shall be managed "on the basis of multiple use," which is defined as "making the most judicious use of the land for some or all of these resources," including where appropriate, allowing persons "the use of some land for less than all of the resources." 43 U.S.C. 1701(a)(7), 1702(c).[1]

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[1] Prior to the enactment of the Federal Land Policy and Management Act, the Bureau of Land Management generally administered the public lands on a multiple use basis pursuant to the superseded Classification and Multiple Use Act of 1964, 43 U.S.C. 1411 (1976), and the Taylor Grazing Act, 43 U.S.C. 315a *et seq.* Under the authority of the Classification and Multiple Use Act, BLM surveyed the public land under its management in the western United States, classifying tracts for retention under multiple use or for disposal. Under Section 701(c) of the Federal Land Policy and Management Act,

The statute authorizes the Secretary of the Interior to "permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way," withdrawals, and cooperative agreements. 43 U.S.C. 1732(b). Pursuant to Section 507, "[t]he Secretary * * * may provide under applicable provisions of this [title] for the use of any department or agency of the United States a right-of-way over, upon, under or through the land administered by him, subject to such terms and conditions as he may impose." 43 U.S.C. 1767(a). Section 501(a) authorizes rights-of-way for a number of specific uses of public lands, as well as "other systems or facilities which are in the public interest." 43 U.S.C. 1761(a)(1)-(7).

The Secretary is also authorized to order withdrawals with respect to any federal lands. 43 U.S.C. 1714(a). A "withdrawal" means "withholding an area of the Federal land from settlement, sale, location or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program." 43 U.S.C. 1702(j). If the Secretary orders a withdrawal of a parcel of 5,000 or more acres, he must prepare a report for Congress that addresses a variety of factors relating to the withdrawal. 43 U.S.C. 1714(c). In addition, before withdrawing any tract, the Secretary must afford an opportunity for the public to be heard. 43 U.S.C. 1714(h).

2. The Department of Energy, which is *not* a party to this case, is charged with implementing the

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all of these classifications remain in effect until modified under the procedures of the new statute. 43 U.S.C. 1701 note.

Nuclear Waste Policy Act (NWPA), 42 U.S.C. 10101 *et seq.* In that statute, Congress has directed the Department of Energy to conduct a multi-year intensive investigation of the Yucca Mountain site, located on public lands in the State of Nevada, for possible use as a repository for high-level nuclear waste. 42 U.S.C. 10133(a). The Department of Energy plans to excavate an exploratory shaft to the proposed depth of the repository horizon and conduct a variety of scientific investigations of the site's geologic, hydrologic, and other geotechnical characteristics. This project will take several years. No radioactive waste, however, will be brought to the site during site characterization.

Following site characterization, the Secretary of Energy, if he finds Yucca Mountain to be a suitable site, may recommend to the President that the site be developed as a repository. 42 U.S.C. 10134(a)(1). The Secretary must prepare a comprehensive statement of the basis for such recommendation, together with an environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332 *et seq.* The State may then submit a notice of disapproval to Congress, which can override that disapproval by passage of a resolution that "becomes law." 42 U.S.C. 10135(b), 10135(c), 10136(b). If the recommendation to develop the site becomes effective, the Secretary of Energy must then obtain a license from the Nuclear Regulatory Commission to construct and operate a repository. 42 U.S.C. 10134(b) and (d).

3. In order to carry out site characterization on a portion of this site, the Department of Energy applied to BLM for a right-of-way to occupy, use, and undertake site characterization activities over some 51,789 acres of public lands near Yucca Mountain.

Pet. App. 64. BLM administers this area under FLPMA pursuant to a multiple use, retention, classification order issued under the now expired Classification and Multiple Use Act of 1964. Pet. App. 69. In processing the application, BLM reviewed and adopted the Department of Energy's Environmental Assessment for Yucca Mountain, prepared pursuant to 42 U.S.C. 10132(b)(1)(E). Pet. App. 72. The Attorney General of Nevada opposed the issuance of the right-of-way, but on January 6, 1988, BLM rejected these objections and issued the right-of-way. *Id.* at 64-65.

4. The first count of the State's complaint against BLM charged that the issuance of the right-of-way violated several statutory provisions. In particular, the complaint alleged (1) that the right-of-way was inconsistent with FLPMA's direction to manage this land for multiple use because the Department of Energy is authorized to undertake activities that are inconsistent with valid, existing uses and that will extensively disrupt the land; (2) that the issuance of the right-of-way was a *de facto* withdrawal issued in violation of FLPMA; and (3) that BLM had not faithfully discharged its duties under NEPA. Pet. App. 66-74. In the second cause of action, the State sought to compel approval of the application of one of its contractors for a similar right-of-way. *Id.* at 74-75.[2] In the third and fourth causes of action, the State alleged that BLM was engaged in a conspiracy with the Department of Energy to violate the Tenth Amendment and the rights of Nevada under the Equal Footing Doctrine, and that there was no con-

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[2] This claim was dismissed as unripe, Pet. App. 45-47, and no appeal was taken from this disposition.

stitutional basis for the grant of the right-of-way. *Id.* at 76-78.

The defendants moved under Federal Rule of Civil Procedure 12(b)(1) to dismiss the entire action for lack of jurisdiction because of the failure to establish standing and, in the alternative, under Rule 12(b)(6) to dismiss the third and fourth causes of action for failure to state a claim. After considering briefs from the parties, the district court granted the motion, dismissing the complaint on January 30, 1989. Pet. App. 11-54.

5. The district court concluded that the State had not alleged facts in its complaint that establish its standing. Pet. App. 29-33. The court noted that the complaint contained no averment of any proprietary or sovereign interest in the public lands in the vicinity of the Yucca Mountain site. *Id.* at 32. Nor did the complaint allege that the State used any of those lands. *Id.* at 31. Consequently, the complaint merely sought to vindicate the State's desire to see that the agency follows the requirements of law, an interest that is not sufficient to establish standing. *Id.* at 34.

The court did note that the State, in response to the motion to dismiss, contended that it and its citizens would be adversely affected in a variety of ways if a nuclear waste repository was actually developed at Yucca Mountain. Pet. App. 32-33. The court concluded, however, that the final decision on whether to use this site for a repository was several years away, and therefore, the potential harm was not of sufficient immediacy to establish an injury under Article III. Pet. App. 33, 36-38.

The court also held that standing could not be based on the State's rights under the Nuclear Waste

Policy Act to participate in the site selection process conducted by the Department of Energy. Pet. App. 38-45. The court concluded that nothing that BLM had done had any effect on the State's ability to exercise its rights under the Nuclear Waste Policy Act. Pet. App. 44-45.[3]

6. The court of appeals affirmed. The court first noted that the State's complaint, while alleging various statutory and constitutional violations, completely omitted any explanation of injury to Nevada. Pet. App. 7. This failure reduced the complaint to a grievance that BLM was not following the requirements of law, an insufficient basis to establish standing.

Second, the court rejected as "mere speculation" the claim that BLM's grant of a right-of-way impinged on the State's political and sovereign right to object to the siting of a repository within the State. Pet. App. 8. Because the decision to develop Yucca Mountain as a repository is "many years and numerous procedural hurdles away," and none of those steps is linked to BLM's actions, the issuance of the right-of-way inflicted no concrete harm on Nevada's sovereign interests. *Ibid.*

Third, the court concluded that Nevada had not shown how any of its proprietary interests had been affected by the grant of the right-of-way. Therefore, the State alleged no injury in its capacity as a proprietor sufficient to confer standing. Pet. App. 9.

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[3] The court also ruled, in the alternative, that Nevada's third and fourth causes of action failed to state a claim. Pet. App. 47-53. The court noted that challenges to the constitutionality of the 1987 Amendments to the Nuclear Waste Policy Act and to the adequacy of the Department of Energy's Environmental Assessment are within the exclusive jurisdiction of the appropriate court of appeals, rather than the district court. Pet. App. 53 n.14; see 42 U.S.C. 10139(a)(1)(C) and (E).

Finally, the court rejected the claim of *parens patriae* standing. Not only had the State failed to plead any injury to its quasi-sovereign interests, but the court of appeals also concluded the State could not assert such interests against the federal government, citing *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. 592, 607 n.14 (1982). Pet. App. 9.

ARGUMENT

The court of appeals held that Nevada lacks standing under Article III because the State's complaint fails to allege any concrete injury to the State's interests as sovereign, as proprietor, or as *parens patriae*. That decision, which rests on well-established standing principles, is correct. Furthermore, it does not conflict with any decision of this Court or of any other court of appeals.

To satisfy Article III, a person seeking to invoke the judicial power must show that he has personally suffered or is in immediate danger of sustaining a direct injury as a result of the allegedly illegal conduct. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974); *Laird* v. *Tatum*, 408 U.S. 1, 12-13 (1972). Here, the State must show first that it has suffered an "injury in fact" that is palpable, concrete, and immediate, and not merely abstract, conjectural, or hypothetical. *Allen* v. *Wright*, 468 U.S. at 751; see *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983). Second, the State must establish a sufficient causal link between the asserted

injury and the allegedly illegal conduct of the defendant, BLM. The causation requirement has two elements: (1) the alleged injury must be fairly traceable to the conduct challenged as unlawful, and (2) the alleged injury must be likely to be redressed by the requested relief. *Allen* v. *Wright*, 468 U.S. at 753.[4]

Nevada's complaint alleges that BLM issued the right-of-way in violation of the requirements of FLPMA, NEPA, and limitations imposed by the Tenth Amendment and the Equal Footing Doctrine. Pet. App. 67-74, 76-78. It further asserts that the BLM's action would injure the State in three capacities: (1) as sovereign, (2) as proprietor, and (3) as *parens patriae*. *Id.* at 61-62.

1. The sovereign interest at stake is Nevada's claimed right to veto, for whatever reasons it chooses, the investigation of public lands for use as a potential repository for nuclear waste.[5] Although the com-

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[4] The fact that the plaintiff is a State does not permit the relaxation of any of these requirements for pleading or proving standing. *Florida* v. *Mellon*, 273 U.S. 12, 16-17 (1927).

[5] Thus, the complaint refers to "Nevada's political right to object to its selection as the host for a repository," Pet. App. 76, to allegations of violations of "Nevada's equal footing and Tenth Amendment rights," Pet. App. 77, to an alleged "infringement upon an unconsenting state's sovereignty," *id.* at 78, and to the State's objection that any authorization to use public land for site characterization requires the "Nevada Legislature's consent as required by * * * Article I, Section 8, Clause 17 [the Federal Enclave Clause]." *Id.* at 67.

The State also asserts in its petition, Pet. 24-26, but not in its complaint, that the actions of BLM injured the economic and environmental well-being of its citizens. But these are allegations of injury to the State's quasi-sovereign interests, not its sovereign interests. *Alfred L. Snapp & Son* v. *Puerto*

plaint implies that the Nuclear Waste Policy Act and its amendments—under which the Department of Energy is required to characterize Yucca Mountain for use as a potential repository and under which the Department of Energy might develop a repository at Yucca Mountain, Pet. App. 62-63—are contrary to the State's claimed sovereign right to refuse consent for the project, such harm cannot fairly be traced to the actions of the defendant in this case. BLM had nothing to do with the passage of the NWPA or the 1987 Amendments, and is not responsible for the NWPA's administration. All that BLM has done is to authorize the Department of Energy to occupy and use the public lands for the purposes of site characterization. This action was taken *not* pursuant to any provision of the Nuclear Waste Policy Act, but in the exercise of BLM's general responsibilities under a preexisting statute, the Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.*[6]

Rico, 458 U.S. at 601-602; see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 n.33 (1981) (possible detrimental impact of the economy of a state does not give rise to a violation of the Tenth Amendment's guarantee of state sovereignty); *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534-535 (1941) (same); *United States* v. *Texas*, 339 U.S. 707, 716 (1950) (Equal Footing Doctrine protects the states' political rights and sovereignty, not their economic stature or standing). Quasi-sovereign interests may be asserted by the State only in its capacity as *parens patriae*, and the sufficiency of the complaint with respect to this basis for standing is discussed at Point 3, *infra*.

[6] The Nuclear Waste Policy Act does contain a provision, applicable to BLM, that requires other agencies to expedite the Department of Energy's applications for permits, but only "to the extent permitted by the applicable provisions of law administered by such agency." 42 U.S.C. 10140(a)(1). The provision further states that the permit shall "include such

It is true that, if the Department of Energy did not have the right-of-way granted by BLM, the Department of Energy could not implement the statutorily mandated program of site characterization. It therefore would be unable to complete the process by which the alleged sovereign injury—imposition of a repository contrary to the State's wishes—could possibly be inflicted. But the fact remains that the action of BLM is not the proximate cause of the State's alleged injury. As the court of appeals put it, "the only '*direct* consequence [of the BLM action] is that the site characterization process will proceed to the next step in accordance with the [Nuclear Waste Policy Act].'" Pet. App. 8 (quoting Pet. App. 37 (emphasis added)). The connection between the alleged injury to the State's sovereignty and the conduct of BLM is simply too attenuated to permit the invocation of the judicial power under Article III. See *Allen* v. *Wright*, 468 U.S. at 753; *Secretary of Interior* v. *California*, 464 U.S. 312, 342-343 (1984); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

Moreover, as the court of appeals concluded, the infliction of this injury is entirely speculative. The State's assumption that a decision has been made to use Yucca Mountain as a repository site is not grounded in the facts. BLM's action does not authorize the use of the property as a repository site. The only body to speak to that subject has been Congress, when it enacted the 1987 Amendments, and,

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terms and conditions as may be required by law, and may include terms and conditions permitted by law." 42 U.S.C. 10140(a)(2) and (b). Thus, when BLM processed the Department of Energy's request for a right-of-way, it acted solely under its own statute, the Federal Land Policy and Management Act.

even then, the use of Yucca Mountain as a repository site is conditioned on several major future contingencies. Any putative injury to the State's sovereignty is simply not attributable to the only defendant named in this case, BLM, and therefore there is no standing to assert such claims against that agency. See *Allen* v. *Wright*, 468 U.S. at 753.

Finally, Nevada acknowledges, Pet. 17, 38, that the State has received a full hearing on all of its claims against the constitutionality of the NWPA, which form the basis of alleged infringement of sovereignty, in its case brought directly against the Department of Energy, the agency that is implementing the NWPA. *Nevada* v. *Watkins*, 914 F.2d 1545 (9th Cir. 1990), cert. denied, 111 S. Ct. 1105 (1991). Now that the judgment in that case has become final, the State is estopped from litigating those claims again. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1971). Accordingly, there is no purpose in reviewing a determination that the State had not pled its standing to raise them in an action against BLM.

2. The second capacity in which the State brought this action is as a proprietor. Pet. App. 62. Although a state may sue to redress injuries to its proprietary interests, such as the interests that arise from owning property,[7] the complaint in this case is devoid of any identification of any of the State's proprietary interests, much less an allegation of how those interests may have been injured by the action of BLM. The affected area is owned by the United States, not Nevada. The court of appeals correctly noted that "Nevada does not own the affected prop-

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[7] See *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. at 601-602; *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 671 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976).

erty, nor has it alleged that it uses the property for any purpose." Pet. App. 9.

3. The State also alleged that it brought this action in its capacity as the *parens patriae*. Under this doctrine, a State may have standing to assert "quasi-sovereign" interests,[8] which fall into two general categories: (1) "the health and well-being—both physical and economic—of its residents in general," and (2) inclusion in "the benefits that are to flow from participation in the federal system." *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. at 607-608. The latter interest does not concern questions of the relationship between the States and the Federal government, which would involve the State's sovereign interests. Rather, it pertains to a State's interest in securing for its citizens the advantages of the federal system, such as freedom from discrimination in interstate commerce or securing the benefits created by a federal statute. *Ibid.*

a. But even when a State may assert such quasi-sovereign interests, the complaint still must satisfy the core requirement of Article III: identification of the nature of the interests it seeks to represent and factual allegations of a direct and immediate injury to those interests. *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. at 602 (quasi-sovereign interests must not be "too vague" because they must "survive the standing requirement of Article III: a quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant"); see *Massachusetts* v. *Mellon*, 262 U.S. 447, 480-482 (1923); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985);

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[8] See *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. at 602-609; *Pennsylvania* v. *Kleppe*, 533 F.2d at 673-675.

Carey v. *Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980).

The court of appeals correctly concluded that the complaint here is "silent as to how these alleged [statutory and constitutional] violations have resulted in injury to Nevada." Pet. App. 7. Therefore, this basis for standing must fail as well. To make up for this defect, the State relies on a variety of materials submitted to the court of appeals that discuss the threats it perceives to the public health and safety, to the environment, and to the economy of the State. Pet. 24-26. Reliance on these materials is not a satisfactory substitute for a properly pled complaint. These materials are not only outside the complaint, but were never made part of the record in the district court.

Nor can the liberal standards of notice pleading be stretched this far to excuse Nevada's failure properly to plead the requisite injury. In *Conley* v. *Gibson*, 355 U.S. 41 (1957), relied on by the State, the complaint described the plaintiffs' status as employees covered by the Railway Labor Act and the defendants' status as plaintiffs' bargaining agent, and further alleged that in the administration of a labor agreement the union had permitted them to be discharged because of their race in violation of the statute. 355 U.S. at 42-43. In *United States* v. *SCRAP*, 412 U.S. 669 (1973), the complaint described the alleged injury as the increased adverse environmental impacts on the air and other natural resources enjoyed by plaintiffs that were alleged to be caused by increases in freight rates set by the Interstate Commerce Commission. 412 U.S. at 678. Similarly, in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), the complaint alleged the plaintiffs were "residents of the City of Richmond or Henrico

County" and were deprived, by defendants' violation of the Fair Housing Act, of the "right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." 455 U.S. at 376. Nevada's complaint in this case, in contrast, contains nothing that even purports to describe injury to its quasi-sovereign interests. The most the State can point to in the complaint is the allegation that the other states have solved the nuclear waste problem "*at the expense* of Nevada." Pet. 22; Pet. App. 77 (emphasis added). This reference is simply too vague to allege any injury establishing standing.

Even if it were appropriate to accept these extra-record materials, the allegations do not describe an actual or threatened injury to the State's quasi-sovereign interests that can be traced to the conduct of the defendant. The State relies on a projection of harms that flow from the construction and operation of a repository at Yucca Mountain. The State ignores the fact, however, that no decision to use Yucca Mountain as a repository site has been made.[9]

The State also overlooks the fact that BLM has no role to play in deciding whether to use Yucca Mountain as a repository site. All those decisions

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[9] Equally unfounded is the State's suggestion that site characterization by itself causes the harm it fears. The premise of the allegation of harm is that the presence of massive quantities of radioactive waste in a repository will have adverse environmental effects and will be feared by the public. It is completely speculative to conclude that the conduct of site characterization activities, which do not involve the placement of waste at the site and which have virtually no impacts off the site itself, will induce the adverse effects imagined by the State.

will be made by the Department of Energy, the President, the Nuclear Regulatory Commission, and perhaps the Congress. As a result, the perceived harm that forms the basis for the State's allegation is not attributable to conduct of the sole defendant, the Bureau of Land Management. The lack of a properly pled allegation of injury to any quasi-sovereign interest is fatal to the claim of *parens patriae* standing.[10]

b. The court of appeals also concluded that a state may not bring a *parens patriae* action against a federal agency, Pet. App. 9, relying on *Alfred L. Snapp & Son* v. *Puerto Rico, supra.* In that case, this Court held that "a State does not have standing as *parens patriae* to bring an action against the Federal Government." 458 U.S. at 607 n.14.[11] The Court quoted

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[10] Nevada also claims that it need only meet the Article III minimum for standing, injury-in-fact, and that the prudential limitations of the standing doctrine do not apply here. Pet. 36-45, 54-55. This contention hardly helps Nevada since the court of appeals held that its complaint failed to allege even the constitutional minimum of injury. The contention is erroneous in any event. Nevada's cause of action for review of the right-of-way is found in the Administrative Procedure Act, 5 U.S.C. 551, not the NWPA, and the zone of interests test is derived directly from the APA. See *Lujan* v. *National Wildlife Fed'n,* 110 S. Ct. 3177, 3186 (1990) ; *Data Processing Service Organizations* v. *Camp,* 397 U.S. 150, 153 (1970). Nevada relies, Pet. 45, on *Gladstone Realtors* v. *Village of Bellwood,* 441 U.S. 91, 100 (1979), but in that case, the Court was construing Sections 810 and 812 of the Fair Housing Act of 1968, 42 U.S.C. 3610 and 3612, not the Administrative Procedure Act.

[11] Contrary to Nevada's assertion, Pet. 53-54, the four concurring Justices did not disagree with this part of the Court's opinion. The quotation from Justice Brennan's concurring opinion is not a reference to footnote 14, the concurring opinion does not even discuss this issue, and the concurring Jus-

from *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923): "it is no part of [a State's] duty or power to enforce [the citizens'] rights in respect of their relations with the federal government. In that field, it is the United States, and not the state, which represents them as *parens patriae*." 262 U.S. at 485-486. The judgment below is consistent with a number of other decisions denying *parens patriae* standing to state challenges to the administration of federal statutes. See *Iowa ex rel. Miller* v. *Block*, 771 F.2d 347, 354-355 (8th Cir. 1985) (challenge under Administrative Procedure Act to administration of disaster relief legislation), cert. denied, 478 U.S. 1012 (1986); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985) (court denied *parens patriae* standing, but found statutory standing to challenge orders under Natural Gas Act); *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 677-678 (D.C. Cir.) (challenge under Administrative Procedure Act to administration of disaster relief legislation), cert. denied, 429 U.S. 977 (1976); *Minnesota* v. *Benson*, 274 F.2d 764, 766 (D.C. Cir. 1960) (statutory challenge to a milk marketing order).[12]

In this Court, Nevada claims, Pet. 55-56, that its challenge falls within a qualification to this bar supposedly preserved in *Massachusetts* v. *Mellon*: "We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress." 262 U.S. at 485. The statute the State is

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tices expressly joined the opinion of the Court. 458 U.S. at 611-612.

[12] Although the Second Circuit in *Carey* v. *Klutznick*, 637 F.2d 834, 838 (1980), found *parens patriae* standing to challenge a census count, that case was decided before *Snapp*.

attacking as unconstitutional, however, is the NWPA; that law is being implemented by the Department of Energy, and not BLM. As we have shown, the challenge to the right-of-way is simply the wrong action against the wrong defendant for the litigation of this claim. For this reason, and in view of the complete failure of the complaint to plead any quasi-sovereign injury, this case is not an appropriate one in which to review the *parens patriae* capacity of a State to sue the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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